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No. 01-1054

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

LABOR/COMMUNITY STRATEGY CENTER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Neither of the Questions framed by the Petitioners is presented on the record made in this matter:

1. Contrary to Petitioners' contention that the majority below "disobey[ed]" decisions of this Court "by construing the [Consent] Decree solely as a judgment rather than as a contract for enforcement purposes," the record (including the critical ruling by the Special Master that Petitioners failed to include in the Appendix to their Petition) demonstrates indisputably that the Special Master, whose decisions were affirmed by the District Court and the Court of Appeals, in fact applied contract law principles to discern the obligations placed upon Petitioners by the Decree.

2. Petitioners' second Question — whether the remedy fashioned by the Special Master and approved by the District Court and the Court of Appeals violated principles of federalism by intruding upon Petitioners' discretionary authority — is founded upon factual assumptions (*i.e.*, that the remedy was not necessary to implement the Decree and was beyond Petitioners' financial capabilities) that were rejected by the Special Master and both courts below. These findings are not only *not* "clearly erroneous" but are well supported on the record. Under these circumstances, and because Petitioners have made no "very obvious and exceptional showing of error," this hypothetical question does not merit review by this court. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

PARTIES TO THE PROCEEDING

Petitioners state (Pet. at ii) that: "All parties appear in the caption of the case on the cover page." However, because that caption is both outmoded and in error, it does not provide a correct listing of parties to this proceeding. Taking into account the automatic substitution of officials of the corporate Petitioner Los Angeles County Metropolitan Transportation Authority pursuant to Fed. R. Civ. P. 25(d), as well as the erroneous listing of four individuals who sought, but were denied, intervention below *in 1994* (Henry Frederick Ramey, Jr., O. Howard Watts, William Tut Hayes, and Victor Dibas), the following is a proper listing of parties to the proceeding in this Court:

1. Bus Riders Union, a charitable, non-profit, non-stock corporation,* Respondent;

2. Pearl Daniels, Respondent;

3. Maria Guardado, Respondent;

4. Korean Immigrant Workers Advocates, a charitable, non-profit, non-stock corporation,* Respondent;

5. Labor/Community Strategy Center, a charitable, non-profit, non-stock corporation,* Respondent;

6. Los Angeles County Metropolitan Transportation Authority, Petitioner;

7. Roger Snoble, Chief Executive Officer of the Los Angeles County Metropolitan Transportation Authority, Petitioner;

8. Southern Christian Leadership Conference of Greater Los Angeles, a charitable, non-profit, non-stock corporation,* Respondent;

9. Naomi Zelada, Respondent; and

10. Ricardo Zelada, Respondent.

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*No parent or publicly held company therefore owns any stock in any of these corporations. See Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented i

Parties to the Proceeding ii

Table of Authorities v

Counter-Statement of the Case 1

1. Background of the Proceeding 1

2. The Consent Decree 3

3. Enforcement Proceedings 5

4. Challenge to the Special Master's Authority ... 9

5. Review by the District Court and Court of Appeals 12

REASONS FOR DENYING THE WRIT 14

I Contrary To Petitioners' Assertions, The Special Master, District Court, And Court Of Appeals All Construed The Terms Of The Consent Decree By Applying Principles Of Contract Interpretation 14

II The Second Question Presented By Petitioners Is Dependent Upon Assumptions That Are Contrary To Factual Findings Concurred In By Two Courts Below And Is Therefore Inappropriate For Review By This Court 18

Conclusion 25

Appendix --

June 24, 1998 Procedural Order of the Special Master 1a

July 15, 1998 Memorandum Decision and Order of Special Master Re Standards for Compliance 7a

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order 24a

July 9, 1998 MTA Brief re Load Factor Compliance 41a

TABLE OF AUTHORITIES

Page

Cases:

Benjamin v. Jacobson,
172 F.3d. 144 (2d Cir. 1999) 15n

County of Alameda v. Weinberger,
520 F.2d 344 (9th Cir. 1975) 2

E.E.O.C. v. New York Times Co.,
196 F.3d 72 (2d Cir. 1999) 17n

Exxon Co., U.S.A. v. Sofec, Inc.,
517 U.S. 830 (1996) ..... i, 22

Golden West Baseball Co., v. City of Anheim,
25 Cal. App. 4th 11 (1994) 16

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Graver Tank & Mfg. Co. v. Linde Air Products Co.,
336 U.S. 271 (1949) ..... i, 22

Harris v. City of Philadelphia,
137 F.3d 209 (3d Cir. 1998) 17n

Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority,
No. CV 94-6936 (TJH (Mcx), Findings of Fact and Conclusions of Law re: Preliminary Injunction
(C.D. Cal. Sept. 21, 1994) 2n

Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority,
No. CV 94-6936 (TJH (Mcx), Memorandum Decision and Recommendations of the Special Master In Re Late Night and Owl Service Modifications (C.D. Cal. Feb. 24, 1998) 8n

Musso v. University of Minnesota
105 F.3d 409 (8th Cir. 1997) 17n

United States v. Armour & Co.,
402 U.S. 673 (1971) 14, 16,17

United States v. ITT Continental Baking Co.,
420 U.S. 223 (1975) 14, 15, 16

TABLE OF AUTHORITIES (continued)

Page

Rules:

Fed. R. Civ. P 25(d) ii

Fed. R. Civ. P. 53 10

Sup. Ct. R. 15.2 1

Sup. Ct. R. 29.6. ..... iiin

Other Authorities:

Appellant Los Angeles County Metropolitan Transportation Authority's Reply Brief, *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority,* 263 F.3d 1041 (9th Cir. 2001) 24

COUNTER-STATEMENT OF THE CASE

Petitioners' Statement is replete with self-serving and incorrect assertions, factual omissions, and misrepresentations of the record, all unsupported by record citation. We limit our comments on such matters to those "that bear[ ] on what issues properly would be before the Court if certiorari were granted," Sup. Ct. R. 15.2.

1. Background of the Proceeding. This action was filed by Respondents on August 31, 1994, seeking "permanently to enjoin the [Petitioners] from operating a discriminatory two tier, separate and unequal system of public transportation--one for poor minority bus riders and another designed to serve predominantly white and relatively wealthy rail riders" (Complaint, ¶ 5). As the majority opinion below summarized (Pet. 3a[1]):

> The suit alleged that MTA was spending a disproportionately large portion of its budget on rail lines and suburban bus systems that would primarily benefit white suburban commuters, while intentionally neglecting inner-city and transit-dependent minority bus riders who relied on the city bus system. The lawsuit was triggered by MTA's decision to spend several hundred million dollars on a new rail line, foregoing an opportunity to reduce overcrowding problems on city buses, while at the same time increasing bus fares and eliminating monthly discount passes.

On September 21, 1994, the District Court granted preliminary

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[1]Citations in this form are to the separately bound Appendix to Petition for a Writ of Certiorari.

injunctive relief to Respondents.[2] "In October 1996, after over two years of discovery and just before a trial was scheduled to

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[2]The District Court made the following Findings and Conclusions supporting its actions:

> 6. Plaintiffs have presented the Court with more than sufficient evidence to meet their burden of preliminarily showing that MTA's actions have adversely impacted minorities; that MTA's actions were not justified by business necessity; and that the MTA has rejected less discriminatory alternatives.
>
> 7. Through their evidence, plaintiffs raise serious questions going to the merits of their disparate impact claim under Title VI, as well as their intentional discrimination claim under Title VI, the Fourteenth Amendment, and 42 U.S.C. §§ 1981 and 1983. A serious question is one that is so substantial and difficult as to warrant more deliberate investigation and, thus, creates a fair basis for litigation. *County of Alameda v. Weinberger*, 520 F.2d 344, 349-50, n.12 (9th Cir. 1975).
>
> 8. MTA, however, has not come forward with sufficient evidence to rebut the plaintiffs' initial evidentiary showing. Rather, MTA provided the Court with mere conclusory statistics without identifying the source or age of the raw data used to reach the statistical results and without specifying the methodology used to gather the data.

Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority, No. CV 94-6936 TJH (MCx), Findings of Fact and Conclusions of Law re: Preliminary Injunction, at 4-5 (C.D. Cal. Sept. 21, 1994). Compare Petitioners' claim that following commencement of this lawsuit, "MTA produced substantial evidence in the district court that the assumed [*sic*] disparity in the treatment of people of color and white bus and train riders was nonexistent. Respondents introduced no contrary evidence." (Pet. at 2 n.1.)

begin, the parties reached a settlement and submitted to the district court a proposed consent decree that set forth a detailed plan to improve bus service" (Pet. 3a).

2. **The Consent Decree.** The Decree, which was approved by the District Court, contains a set of "Basic Principles and Objectives" which MTA promised to "work with representatives of the plaintiffs' class in implementing" (Pet. 173a-174a), specific "Service Improvements" to be undertaken by Petitioners (Pet. 175a-179a), and provisions for maintaining or modifying MTA's fare structure (Pet. 180a-182a), as well as sections concerning implementation and enforcement of the Decree, etc.[3] The present proceeding principally concerns one part of the "Service Improvements" section of the Decree: "Reducing [Bus] Overcrowding By Adding New Service" (Pet. 175a-177a), containing four paragraphs, each of which bears upon the current controversy.

The first paragraph establishes intermediate and final goals for "reduction in levels of crowding on board buses," expressed as "reduction of the maximum load factor ceiling *for all bus routes*," with the first target reduction to be achieved by December 31, 1997 (Pet. 175a [emphasis added]).

The next paragraph delineates a precise definition of "load factors" to be used in measuring compliance:

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[3]For example, the Decree both required the establishment of a "Joint Working Group" ("JWG") with equal representation of both parties to assist in its implementation (Pet. 182a) and also appointed — subject to the District Court's approval, which was granted — the mediator who had assisted in the negotiation of the settlement as Special Master, to whom disputes arising under the Decree would be referred "for resolution, pursuant to procedures set forth by the Special Master," subject to review by the District Court (*id.* at 183a).

> 2. *Load Factor Definition.* "Peak load factor" shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 minute weekday peak period in the peak direction of travel *on each bus line*. This load factor computation would be based on a one hour time interval during non-peak periods. Target load factors shall not be achieved by by-passing passengers at bus stops. MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules. . . . The JWG may request that MTA collect additional data as appropriate to monitor compliance with the load factor targets.

(Pet. 175a-176a [emphasis added].)

The third paragraph places responsibility upon MTA to prepare, at least 90 days prior to the beginning of each fiscal year, a "plan to make available sufficient additional buses and other vehicles to meet these target load factors" and to take cognizance of such plans in any "scheduled modification to its long range plan" (Pet. 176a). It continues:

> If ridership shall increase by more than 15 percent *on any bus line* MTA shall nevertheless make its best efforts to meet *the target for that line* and *the target for that line* may be deferred for one (and only one) year.

(*Id.* [emphasis added].)

The final paragraph concerns any "Failure to Meet Targets" and it provides:

> 4. *Failure to Meet Targets.* If MTA fails to meet the target load factors *for all bus lines* by the dates in paragraph 1 above, (except those exempted or deferred under paragraph 3 above), MTA shall meet the

> target as soon as possible and reallocate sufficient funds from other programs to meet the next lower target load factor as scheduled. The reprogrammed funds, which may include but not be limited to revenues from Propositions A and C discretionary funds, shall be used to meet the target load factors. Any dispute concerning whether the targets have been met; or if the targets have not been met, whether sufficient funds have been reprogrammed to meet the next target will be reviewed by the JWG. ~~If~~ [If /s/ Bliss] the JWG cannot resolve the matter it will be referred to the Special Master. The failure of MTA to meet the target load factors shall not be deemed a changed or unforeseen factual condition for purposes of seeking a modification of this Consent Decree by MTA.

(Pet. 177a [emphasis added].)

3. **Enforcement Proceedings**. As the majority opinion below summarized,

> [S]oon after the first L[oad]F[actor]T[arget] deadline passed on December 31, 1997, the Special Master was pressed into service. The plaintiffs alleged that MTA had failed to meet the first LFT. In addition, the parties disputed the meaning of the LFTs, the extent to which MTA had or had not met its obligations under the consent decree, and the proper remedy to achieve compliance with the decree. . . . The Special Master set out a bifurcated procedure for resolving the matter. First, the parties were to brief the issue of how to measure compliance with the decree. Second, once the Special Master had determined a method for measuring compliance, the matter was to be referred back to the JWG to determine whether MTA had fulfilled its obligations, and to craft a remedial plan if it had not. If

> the JWG could not agree on a remedial plan, the parties would then submit their respective remedial proposals to the Special Master for resolution of the issue.

(Pet. 7a-8a [footnote omitted].) Accordingly, on June 29, 1998, the Special Master directed the parties to "submit simultaneous briefing on the following foundation legal issue":

> *Under the decree*, what is the concrete standard by which the Special Master is to measure compliance with the target load factor requirements?

(Opp. App.2a [4] [emphasis added].) MTA's brief, set out in the Appendix *infra* (Opp. App.41a-64a), in its very first sentence proposed that "[t]he primary task for the Special Master is to *devise* a standard by which to determine whether the MTA has complied with the target load factor requirements of the Consent Decree" (Opp. App. 45a [emphasis added]). MTA suggested a standard based on a survey of other bus transit operators that it had conducted in 1997, *after* the Consent Decree was submitted and approved (*see id.* at 50a).[5] Only once in its entire brief did MTA refer to the standard that was embodied in the language of the Consent Decree, which it urged the Special Master to reject:

> Under the vague standard existing in the Consent Decree, the MTA–by meeting the target in more than 97% of the periods monitored–has been in compliance with the load factor target requirements up to this point

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[4]Citations in this form are to the Appendix to this Brief in Opposition, *infra*.

[5]MTA proposed "that the standard for compliance should be a measurement of MTA's overall compliance rate, per time period, against the industry-wide percentage of service interruptions" (Opp. App. 11a).

> in time. If the Special Master adopts the criteria set forth herein, the MTA should be given a reasonable period of time to come into conformance with this *newly proclaimed* objective standard.

(Opp. App. 54a [emphasis added].)

On July 15, 1998, the Special Master entered an Order Re Standards for Compliance (Opp. App. 7a-23a) rejecting MTA's proposal. Pointing to the repeated references in the relevant portions of the Consent Decree to reductions in overcrowding for "all bus routes" and "all bus lines," and the absence of "language in the Consent Decree which provides for the possibility of averaging across multiple lines" (*id.* at 9a [underlining in original]), the Master specifically relied upon principles of contract interpretation in reaching his conclusion:

> In the absence of ambiguity, a court will interpret a contract or statute according to the clear, explicit meaning of the words used. *See e.g., Avemco Ins. Co. v. Davenport*, 140 F.3d 839, 842 (9th Cir. 1998); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The preceding provisions [of the Consent Decree] allow for only one meaning: compliance with the load factor ceiling is required for all bus routes except those exempted under the provisions of II.A.3.

(Opp. App. at 10a.)[6] The Master requested that the JWG (see

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[6]*See also* Opp. App. at 34a (Order re Plaintiffs' Motion for Reconsideration of the Special Master's July 15, 1998 Order re Compliance Standards) ("Extrinsic evidence supporting an interpretation to which an agreement is not reasonably susceptible is not admissible. *Barris Indus., Inc. v. Worldvision Enters., Inc.*, 875 F.2d 1446 (9th Cir. 1989). The declarations of Dana Woodbury and Harold Hirsch, submitted by the MTA on July 8, 1998, constitute such inadmissible extrinsic evidence because they support

supra pp. 5-6) determine, pursuant to the compliance standards enunciated in his Order, whether the initial load factor target had been met by MTA (Opp. App. 18a). "On September 8 and 9, 1998, the JWG found that the MTA was not in compliance with the 1.35 LFT for 75 out of the 79 monitored MTA bus lines" (Pet. 58a).

When neither the JWG nor the parties, negotiating directly, were able to reach agreement on appropriate remedial steps to address the noncompliance, the parties submitted separate proposals and supporting briefs to the Special Master. Both parties agreed on the causes of approximately half of the instances of noncompliance demonstrated by monitoring (Pet. 62a-63a), and both agreed that MTA needed to purchase some number of additional buses (besides replacing unreliable vehicles in its fleet whose repeated breakdowns were a major factor in overcrowding) in order to comply with the load factor

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MTA's unreasonable interpretation that the Consent Decree requires compliance based on an averaging across all bus routes."); Pet. 145a (Special Master's decision on MTA's motion for clarification and modification of subsequent remedial order) ("Having reviewed the language of the Consent Decree, the MTA's arguments and my prior Orders, I continue to find that the standards enunciated in previous Orders are fully in keeping with the MTA's repeated admonitions that the meaning of a contract is to be gleaned from the language of the writing alone. *See also* Cal. Civ. Code § 1639.").

In an earlier decision, the Special Master had stated that "the Consent Decree must be 'construed with reference to ordinary contract principles of the state in which the decree is signed.' Gates v. Gomez, 60 F.3d 525, 530 (9th Cir. 1995) (citations omitted)." *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, No. CV 94-6936 TJH (MCx), Memorandum Decision and Recommendations of the Special Master In Re Late Night and Owl Service Modifications, at 13 (C.D. Cal. Feb. 24, 1998).

targets in the Consent Decree.[7] Petitioners estimated the number of additional buses needed at 160 (*id.* at 72a); Respondents calculated that a much larger number, 553 new vehicles, would be necessary (*id.* at 74a). In a March 6, 1999 Memorandum Decision and Order (*id.* at 50a-122a), the Special Master conducted a painstaking analysis of the extent and causes of overcrowding on buses, concluding that in addition to replacing unreliable vehicles in its fleet, MTA needed, and was therefore directed, to purchase a total of 430 additional buses (Pet. 119a).

4. Challenge to the Special Master's Authority. Petitioners sought reconsideration of this March 6, 1999 Order by the Special Master. Not only did they ask the Special Master to recalculate and reduce the number of additional buses he had determined were necessary to meet the targets, but they also challenged the Master's authority to do anything except determine "(1) whether the [load factor] targets have been met, or (2) whether sufficient funds have been reprogrammed to meet the next target" (Pet. 136a) (quoting MTA motion). After careful consideration, the Special Master on May 14, 1999 granted reconsideration and reduced the number of new vehicles that MTA would be required to purchase to 379 (*id.* at 157a).

The Special Master rejected the challenge to his remedial authority, relying principally upon the language in § V of the Consent Decree providing that, in case of "any dispute arising under any provision of Sections I through IV of this Consent Decree" that could not be resolved by either the JWG or the parties' attorneys, "the attorneys *shall* refer the matter to

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[7]The parties' plans were designed to bring MTA into compliance not only with the first required reduction in overcrowding set by the Consent Decree, but also with the second (June 2000) target (see Pet. 175a), which was rapidly approaching.

the Special Master *for resolution*, pursuant to procedures set forth by the Special Master" (Pet. 137a [emphasis added]). The Master rejected Petitioners' argument that his authority was limited to the specific subjects mentioned in Section II.A.4. of the Decree,[8] again relying specifically on applicable canons of contract interpretation in California:

> The remedial powers described in Section II.A.4 are fully consistent with the Special Master's dispute resolution authority found in Section V. Well-established canons of contract interpretation, embodied in California law, provide that the "whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Reading these two sections together, and giving effect to each, it is clear that the Section II remedial powers authorizing the Special Master to determine whether MTA funds must be reprogrammed *supplements*, rather than excludes, the Special Master's Section V power to issue remedial orders resolving disputes under the Decree.

(Pet. 137a-138a [emphasis in original].) The Special Master also found that the District Court's Order of Reference (formally appointing him pursuant to Fed. R. Civ. P. 53 and the Consent Decree) reinforced his authority to issue remedial orders (*id.* at 138a) and, finally, that MTA itself had previously recognized and acted upon this authority:

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[8] "Any dispute concerning whether the targets have been met; or if the targets have not been met, whether sufficient funds have been reprogrammed to meet the next target will . . . [if not resolved by the JWG] be referred to the Special Master" (Pet. 177a [bracketed language added]).

> As the Plaintiffs have pointed out, the MTA's prior conduct in these proceedings reflects an explicit recognition of the Special Master's authority to resolve disputes and compel the parties to act when necessary. Most notably, in July 1998, the MTA filed a motion asking the Special Master to exercise his dispute resolution authority and prohibit the Plaintiffs from organizing a "no seat, no fare" strike. The MTA cited to the Special Master's powers under Section V.B. of the Consent Decree and concluded the following:
>
> > "Here, the Special Master was appointed to monitor the parties' compliance with, and resolve any disputes arising under, the Consent Decree. (Consent Decree, § V.) The Consent Decree does not impose any limitations on the Special Master's powers or authorities [*sic*] to effectuate these objectives. Accordingly, *the Special Master has the inherent authority to issue orders and resolve disputes* raising [*sic*] under the Consent Decree."

(Pet. 139a [emphasis added by Special Master].)

The Special Master also disagreed with MTA's contention that the Decree left formulation of a remedy for noncompliance up to the unreviewable discretion of the agency:

> MTA attempts to nullify the Special Master's agreed-upon authority by misreading Section II.A.3 of the Decree, which provides that the MTA initially has the discretion to determine how to meet the load factor requirements. The MTA contends that under this provision it is the sole arbiter of how to remedy its own violations.

> The MTA was fully afforded the initial discretion contemplated by Section II.A.3. From 1996 to the present, the MTA, in its sole discretion, decided what steps to take to comply with the Decree. Those steps, however, have been shown to be insufficient.

(Pet. 140a-141a [footnote omitted]). The Master also rejected MTA's argument that he was required to defer to MTA's views on the remedy for noncompliance (Pet. 141a-144a).

5. Review by the District Court and Court of Appeals. Petitioners sought review of the Special Master's Orders in the District Court,[9] which on September 23, 1999 reduced the number of buses that MTA would be required to purchase pending reconsideration by the Special Master, and otherwise affirmed the Master's rulings (Pet. 43a-48a).[10] The District Court held that the Special Master and the Court were vested under the Consent Decree with authority to issue remedial orders to Petitioners, as a matter of, first, clear statement in the Decree itself; second, judicial estoppel based upon MTA's prior request that the Master issue an injunction

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[9]Section V.B. of the Consent Decree provides that "Any matter resolved by or referred to the Special Master may be reviewed by the District Court, along with the recommendations of the Special Master, if any, upon motion by either of the parties" (Pet. 183a).

[10]The District Court specifically affirmed the Special Master's rejection of MTA's claim that it had sole authority to devise remedies for its own noncompliance with the Decree: "By the clear language of the consent decree, the MTA had the *initial* responsibility to devise and implement a plan to reduce bus overcrowding. Since the MTA failed to meet the obligations imposed by the consent decree, it is now up to the Special Master and the Court – through the Court's equitable powers – to enforce the consent decree." (Pet. 45a [emphasis in original].) The District Court amended its Order slightly on October 6, 1999 (Pet. 49a).

against the Bus Riders Union; and third, the inherent authority of a court of equity to enforce its injunctions (Pet. 44a-45a).

A divided panel of the Court of Appeals affirmed the judgment of the District Court (Pet. 1a-20a). The majority agreed with the Special Master's determination of the standard for measuring compliance with the load factor targets based upon the language of the Consent Decree (*id.* at 14a-15a) and rejected MTA's argument that the Master lacked power to resolve disputes under the Decree and issue remedial Orders in the event of noncompliance (*id.* at 17a-18a). Judge Hall did not dissent on these questions, writing that "MTA consented to the terms of the decree, including the Load Factor Targets ('LFTs') and the special master's role in resolving disputes" (*id.* at 22a, 34a).

The panel majority also found no error in the Special Master's factual finding that MTA "had failed to demonstrate that it lacked sufficient funds to otherwise meet its statutory obligations" if it complied with his bus-purchase Order (*id.* at 15a-16a) and concluded that the Master's and District Court's Orders did not unduly intrude into the management of MTA's affairs (*id.* at 18a-20a) "because (1) MTA consented to this dispute resolution, (2) MTA had the opportunity to comply with the Consent Decree but failed to do so, and (3) the remedial order does not require a violation of state or federal laws" (*id.* at 18a).

Judge Hall, dissenting in part, recognized that "because of MTA's failure to prepare a plan that addressed all of its LFT violations, the special master and district court could not fully defer to MTA's proposed plan" (*id.* at 23a, 35a). Nevertheless, she viewed the remedy ordered by the Special Master as too intrusive because it failed to allow "MTA enough time to secure [state and federally required] approvals" to use funds to purchase additional buses "nor made the remedy contingent

upon obtaining them," *id.* at 25a, 37a; *see id.* at 29a, 41a (same); *id.* at 27a, 39a ("Although there was evidence before the court to support the conclusion that MTA had not yet exhausted all possible sources of funding for new buses, that evidence also showed that MTA would have to . . . go through planning and approval processes, the very same types of funding programs with which the remedial order prevents MTA from complying").

REASONS FOR DENYING THE WRIT

I

Contrary To Petitioners' Assertions, The Special Master, District Court, And Court Of Appeals All Construed The Terms Of The Consent Decree By Applying Principles Of Contract Interpretation

Petitioners argue that the Special Master (*see* Pet. at 5 n.3), the District Court (*see id.* at 8), and the Court of Appeals (*see id.* at 10) all disregarded this Court's decisions in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) and *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975) "by construing the Decree solely as a judgment rather than as a contract for enforcement purposes" (Pet. at i). But Petitioners cite no language from any of the opinions below supporting their assertion, as these examples from their discussion of the Court of Appeals' ruling illustrate:

> Despite petitioners' discussion of *ITT Continental Baking* and *Armour & Co.*, the majority held that the Decree should be construed only as a judgment (Pet. at 10 [no citation provided]).
>
> Although the MTA called *ITT Continental Baking Co.* and *Armour & Co.* to the Court of Appeals' attention,

> the panel failed to follow or even mention those cases (Pet. at 11 [no citation provided]).

The Court of Appeals did discuss the status of the Consent Decree as a judgment, but only in the section of the majority opinion setting out the Standard of Review (Pet. 13a), where it stated that

> A consent decree is enforceable as a judicial decree and "is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).[11] This court reviews de novo the district court's interpretation of the consent decree, but must defer to the district court's factual findings underlying the interpretation unless they are clearly erroneous [citations omitted].

Id. This language is wholly unexceptionable, simply recognizing that remedies for violations of consent decrees are not limited to those available for violations of private contracts because consent decrees approved and issued by courts are injunctions. "Consent decrees and orders have attributes both of contracts and of judicial decrees .... Because of this dual character, consent decrees are treated as contracts for some purposes but not for others." *ITT Continental Baking*, 420 U.S. at 236 n.10 (citations omitted).[12]

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[11]Petitioners assert that "[t]he majority opinion cites *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992), to support its conclusion that the Decree should be interpreted *only* as a judgment" (Pet. at 11 [emphasis added]). That is a blatant misrepresentation of what the majority opinion — which does not include the word "only" — says.

[12]*See, e.g., Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999) (*en banc*) (distinguishing between private settlement

The Court of Appeals' agreement with the Special Master's and District Court's interpretation of the Consent Decree rested solidly on the most basic canon of construing contracts: the specific language of the writing. (Pet. 14a-15a.) Indeed, the Special Master explicitly referred to and relied upon principles of contract interpretation applied by the California courts in reaching his conclusions about the meaning of the Decree and the obligations it placed upon Petitioners. See discussion *supra* pp.7 & n.6, 9-11; see also Pet. 138a (citing *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11 (1994)). The "issue" framed by Petitioners simply is not in this case.

Moreover, the approach taken by the Special Master and the courts below is fully consistent with the rulings in *Armour* and *ITT Continental Baking*. This Court emphasized in *Armour* that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it," 402 U.S. at 682, and in *ITT Continental Baking* that "the instrument must be construed as it is written, and not as it might have been written had [one of the parties] established his factual claims and legal theories in litigation," 410 U.S. at 236 [language in brackets added], quoting *Armour*.[13]

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agreements and consent decrees: "A plaintiff willing to settle constitutional claims by way of a consent decree seeks the assurance that, if the defendant fails to fulfill its agreed obligations, those obligations will be enforceable through the court's exercise of its contempt power. . . . The parties may of course enter into an agreement that is not conditioned upon such approval [by the court], but that would be a different agreement from an accord envisioning a consent decree").

[13]The various decisions of federal courts of appeals with which Petitioners suggest the ruling below is in conflict (Pet. at 16)

Finally, the "construction" of the Decree that Petitioners urge, measuring compliance with the load factor targets by calculating MTA system-wide "averages over 20-minute peak periods" (Pet. at 3) could not represent the contemporaneous "intent" of the parties when the Consent Decree was negotiated (*see id.* at 5 n.3) because it was suggested by Petitioners to the Special Master as a standard to be "newly proclaimed" by the Master in preference to the standard "existing in the Consent Decree," *see supra* pp. 6-7 (quoting Petitioners' letter brief to the Special Master, *infra* Opp. App. at 54a).

For all of these reasons, the first "Question Presented" by Petitioners does not arise on the record of this case, and there is no basis for issuing the Writ. Were the Court to grant review on this issue, it would inevitably find it necessary to dismiss the Writ as improvidently granted.

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do not hold otherwise. *E.g.*, *E.E.O.C. v. New York Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999) ("Although courts have equitable powers to enforce consent decrees, such power exists only to ensure compliance with the decrees' terms. . . . the statistical goals in the instant case are specifically set out in the decree. By focusing on those goals, we are, therefore, enforcing the express agreement of the parties."); *Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir. 1998) ("We discern the scope of a consent decree by examining the language within its four corners. . . . A court should not later modify the decree by interposing terms not agreed to by the parties or not included in the language of the decree."); *Musso v. University of Minnesota*, 105 F.3d 409, 411 (8th Cir. 1997) (applying *Armour* to reject argument that "special mechanism for dealing with sex discrimination claims" created by consent decree was available, by virtue of "relation back" theory applied by courts in discrimination cases, to alleged victim of retaliatory act that took place after "the bargained-for-date [stated in the decree] on which that mechanism lapsed").

II

The Second Question Presented By Petitioners Is Dependent Upon Assumptions That Are Contrary To Factual Findings Concurred In By Two Courts Below And Is Therefore Inappropriate For Review By This Court

Petitioners' heated rhetoric about the lower courts' alleged disregard of the principles of federalism in this case has no roots in the proceedings or decisions below. First of all, the Special Master and the reviewing courts gave appropriate deference to MTA's governmental status and financial panel situation. Second, the concern of the dissenting judge on the panel — that the Special Master's decisions inflexibly ignored the possibility that MTA might encounter delays in obtaining the necessary funding for bus purchases, or even funding denials because his rulings did not allow the time needed for various grant applications and approvals — overlooks the Special Master's explicit clarification of his directives, when requested by MTA, so as to provide that delays in obtaining new equipment that were beyond MTA's control "would not be considered a violation of the remedial plan" that he ordered into effect (Pet. 135a n.13).

Petitioners assert that the decisions below improperly "intrude into the discretionary authority committed to state agencies" by "ordering the MTA to buy hundreds of buses" (a) "that the Decree did not require" and (b) "that the MTA had insufficient funding to buy and to operate while simultaneously meeting its statutory obligations to users of its transportation systems other than bus riders" (Pet. at i). To the extent that the first proposition is intended to incorporate MTA's contention that there was no failure on its part to meet the load factor target in the Decree, properly construed (*see* Pet. at 13), it

merges with the first Question Presented and has been dealt with above. Petitioners' remaining point about what the Decree required appears to be that the courts below should have deferred to MTA's own calculations of how many additional buses would be necessary to assure compliance with the Consent Decree as construed by the Special Master. (*See* Pet. at 6 ("The MTA produced substantial evidence . . . that it would meet the next [load factor reduction] target by implementing its L[oad]F[actor]R[emediation]P[lan]").)

However, the fundamental design flaws of MTA's plan made a substantial measure of deference inappropriate, as even the dissenting judge below recognized:

> [U]nlike MTA, federal courts are not in the business of running and funding local transportation systems. . . . For this reason, a substantial measure of deference to the local agency generally is appropriate. . . . Unfortunately, in the instant dispute, MTA put forward a remedial plan that was based on data covering only 20 of the 79 bus lines at issue. Because of MTA's failure to prepare a plan that addressed all of its LFT violations, the special master and district court could not fully defer to MTA's proposed plan.

(Pet. 23a, 35a.)[14] The Special Master performed his own detailed analysis of the data submitted by the parties (*see id.* at 76a-121a, 160a-169a) and, in the words of the majority

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[14]The Special Master found that Respondents' remedial plan "provide[d] a more comprehensive picture from which to determine line-by-line causes of load factor violations and serve[d] as a basis for tailoring appropriate remedies to the problem of overcrowding" because it was based on load factor violation "data for all 77 [bus] lines" "during the entire period from November 1997 through September 1998" (Pet. 76a, 77a).

opinion, "attempted to steer a middle course between the competing remedial plans" (Pet. 9a) in determining how many additional buses were necessary to comply with the Decree.[15] Except for directing reconsideration of some portions of the Special Master's remedial orders, the District Court affirmed the Master's factual findings on this subject (*id.* at 47a) and they were not disturbed by the Court of Appeals.

The second of Petitioners' points, that the rulings below were improperly intrusive because they failed to recognize MTA's limited funding and its need to meet its other statutory obligations, is equally lacking in merit.

Petitioners requested reconsideration and modification of the Special Master's remedial order on the basis of the same contentions. The Special Master concluded that MTA's protestations were unsupported and excessive:

> [T]he MTA does not demonstrate specifically how the March 6 Order would compel the MTA to violate any statutory obligations. In the MTA's May 4, 1998 draft Restructuring Plan, the MTA identifies the many funding sources for which bus capital and/or operating costs are eligible. [citation omitted.] For many of these bus-eligible funding categories, no funds at all have been allocated to buses. *See generally* Declaration of Thomas A. Rubin . . . (noting that the MTA has not applied for, allocated or obtained maximum bus

---

[15]Although Petitioners argue that "The Decree never required the MTA to buy a bus whenever a target was missed" (Pet. at 4) and that "Nothing in the Decree required the MTA to buy buses if targets were missed; targets could also be met by vehicles other than buses, such as vans or taxis" (Pet. at 5), MTA's own remedial plan "concluded that 160 additional buses would be required to ensure compliance with the Decree" (Pet. 72a).

funding under various federal, state and local funding sources including Sections 5307, 5309 and Proposition C Funds). Thus, the fact that the MTA apparently has not applied for, allocated or received these bus-eligible funds somewhat undercuts the MTA's argument that it will be forced to tap already-committed funds, and therefore violate its other statutory obligations, to comply with the Decree. [footnote omitted.]

. . .

Moreover, . . . the MTA does not specifically show how its long-range budget, with careful and advance planning, cannot accommodate the expenditures required to comply with the March 6 Decision as modified by this Order. On the contrary, the November 11, 1998 Regional Transportation Alternatives Analysis ("RTAA") concluded that as a result of suspended rail projects and expanded funding sources, the MTA is expected to have approximately $1.4 billion in funds available between FY99 and FY04. While there are, of course, other important projects that call for the use of these funds, the fact remains that, on this record, the MTA has not shown why some of these funds could not be used to fund or to secure the funding of the expansion buses required by the Remedial Plan [footnote omitted.][16]

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[16]As the Special Master observed,

> Focusing on its other obligations . . . does not relieve the MTA from its obligation under the Decree to make bus operations its *first* priority:
>
> > "consistent with other statutory responsibilities and obligations, MTA's first priority for the use of bus-eligible funds realized in excess of funds already budgeted [in October, 1996] for other purposes

(Pet. 147a-149a.) These findings were not disturbed by the District Court, and the Court of Appeals specifically held not only that they were subject to the "clearly erroneous" standard of review, but also that "MTA has not pointed to any evidence suggesting that the Special Master's factual finding that MTA had not exhausted all sources of funding was clearly erroneous" (Pet. 16a-17a).

Thus, the factual foundations of both prongs of the "federalism" arguments advanced by Petitioners are conclusively undermined by the explicit findings of the Special Master and both reviewing courts below. Under these circumstances, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *quoted in Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996), a showing not made by Petitioners here.

> shall be to improve bus service for the transit-dependent by implementing MTA's obligations pursuant to this Consent Decree."
>
> Consent Decree § I.F. [footnote omitted.] As a practical and contractual matter, the allocation of sufficient resources to halt the deterioration of bus service to the MTA's most frequent daily customers – the transit-dependent of Los Angeles – should take precedence over the funding of new transit alternatives, even those designed to attract new transit patrons. This is what the Consent Decree requires.

(Pet. 148a [emphasis in original] [bracketed language added].) The Master expressly ruled: "I do find that the MTA has not allocated, through reprogramming or otherwise, sufficient funds to procure and operate an adequate number of expansion buses to remedy the load factor violations attributable to insufficient capacity" (Pet. 126a n.2). *Compare* Consent Decree § II.A.4. (Pet. 177a).

Nevertheless, Petitioners argue that the Special Master's Order required MTA to seek state and federal funding to buy buses without "meeting the statutory conditions precedent with which it had to comply" and "imperiled the MTA's existing and future funding" (Pet. at 8-9 [footnote omitted]); *see also id.* at 10 (referring to "MTA's impending loss of State and federal funding caused by the district court's mandatory injunction").) Judge Hall, dissenting below, also expressed concern that the "district court and special master neither gave MTA enough time to secure these [precedent funding] approvals nor made the remedy contingent upon obtaining them" (*id.* at 25a, 37a).

Whatever force these considerations might otherwise have is vitiated by the following facts: *First*, in response to MTA's request for reconsideration and modification of the March 6 Order, the Special Master explicitly indicated that his Order was not intended to supersede compliance with statutory or programmatic requirements of funding programs, even if that caused delay in placing buses into service:

> The Special Master recognizes that severe time constraints face the MTA. While the MTA has in place a sound program that will address the "missing bus" cause of the load factor violations, it has not moved expeditiously to remedy, through fleet expansion, the "insufficient capacity" violations. In trying to catch up at this late stage, the MTA undoubtedly will need to satisfy various legal prerequisites and may confront unanticipated obstacles. These problems will have to be addressed if and when they present themselves. In the meantime, progress should be detailed in the quarterly reports.
>
> Again, perfection is not required and the MTA is not being asked to perform the impossible. If the MTA has a sufficient and court-approved remedial plan

> in place, and can establish that it is taking every reasonable step in its power to execute faithfully this plan, then, for example, the late arrival of additional new buses for reasons beyond the MTA's control *would not be considered a violation of the remedial plan.* To date, however, the MTA appears to resist any requirement of additional new expansion buses as part of a remedial plan that it has not, in its sole discretion, devised.

(Pet. 135a [footnote placed in text to avoid confusion] [emphasis added].)

Second, as MTA informed the Court of Appeals in its reply brief, it promptly complied with the District Court's ruling (while seeking a stay of its Order) by purchasing 297 additional buses:

> In response to the district court's September 23, 1999 order, the MTA Board of Directors voted on September 29, 1999, to procure 297 new buses and directed the MTA staff to commence the procurement process immediately.... Those buses represent the full amount of new buses that the MTA was directed to purchase by Mr. Bliss's memoranda, as modified by the district court's September 23, 1999 order.

(Appellant Los Angeles County Metropolitan Transportation Authority's Reply Brief at 12, *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, 263 F.3d 1041 (9th Cir. 2001) (No. 99-56581) (Pet. 1a-30a).) Although the Ninth Circuit granted a stay pending appeal, this bus purchase order was not withdrawn. Yet none of the dire consequences which Petitioners continue to predict has occurred: MTA has not lost state or federal funding, nor been sanctioned for failing to comply with applicable procedures for seeking funding. Petitioners have not returned

to the District Court to seek relief from any practical problems flowing from their compliance with its Order. In short, Petitioners' actual experience in complying with the orders below demonstrates that the problems they conjure up are imaginary, not real. They certainly do not warrant this Court's review.

CONCLUSION

Because the Special Master and the lower courts interpreted the Consent Decree in this case pursuant to California law and canons of contract construction, the first Question Presented by Petitioners does not arise on this record and therefore provides no ground upon which the judgment below should be reviewed.

The second Question Presented by Petitioners is equally inappropriate for review by this Court, because it assumes facts contrary to the findings of the Special Master that were accepted as not clearly erroneous by both courts below.

For the foregoing reasons, Respondents respectfully submit that the Writ should be denied.

Respectfully submitted,

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APPENDIX

June 29, 1998 Procedural Order of the Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS

LABOR/COMMUNITY STRATEGY CENTER, et al.,	)	Case No. CV 94-5936 TJH (MCx)
Plaintiffs,	)	**IN RE LOAD FACTOR COMPLIANCE**
vs.	)	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE,	)	
Defendants.	)	

PROCEDURAL ORDER

On June 24, 1998, a pre-hearing status conference on the issue of load factor compliance was held in Los Angeles between the Special Master and counsel for the parties. After hearing the arguments made at the conference, and after reviewing the joint preliminary report submitted by the parties, I have decided to implement the following procedures in an attempt to streamline the process in this consolidated Sta[g]e I and Stage 11 proceeding.

June 29, 1998 Procedural Order of the Special Master

First, the parties shall submit simultaneous briefing on the following foundation legal issue:

> Under the decree, what is the concrete standard by which the Special Master is to measure compliance with the target load factor requirements?

In briefing this question, it is suggested that the parties cover the following four sub-issues:

> (1) Should compliance with the load factor requirement be measured on a system-wide basis, on a line-by-line basis, or by some other criteria?
>
> (2) In determining whether load factor compliance has been reached, does the decree require that the data to be measured include data on by-passed passengers?
>
> (3) Under the decree, what is the proper method of computing the "20 minute weekday peak period" specified under § II.A.2?
>
> (4) Does the decree permit taking any mitigating factors into account in determining whether MTA is in compliance with the load factor targets? Does the decree permit the load factor targets to be exceeded under any circumstances? If so, how should mitigating factors or target exceedence be defined and quantified for the purpose of determining compliance with the decree?

The parties are also invited to brief other legal issues relevant to the foundation legal issue set forth above, including the issue of the "102 additional buses" requirement to the extent relevant. Specific issues relating to the status of the Pilot Project will not

be addressed in this proceeding. Opening briefs shall be faxed to the Special Master and to opposing parties no later than July 8, 1998. Optional reply briefs shall be faxed no later than July 9. There will be no extensions.

Second, once a decision is reached by the Special Master (scheduled for July 15) the Joint Working Group shall meet to determine whether or not the MTA, under the appropriate standard, has achieved compliance under the decree. This determination by the JWG shall be made no later than 5:00 p.m. EDT (2:00 PDT) July 21, 1998. If the JWG cannot reach agreement on this issue, the question of compliance shall be referred back to the Special Master. If the JWG finds that the MTA is in compliance with Section II.A of the decree, this proceeding will be terminated. If the JWG finds that the MTA has not achieved compliance under the decree, it shall continue to meet to make recommendations as to the precise degree of noncompliance and the specific remedies required to achieve compliance. The JWG shall report its specific determinations and recommendations on these issues directly to the Special Master on or before a date to be established by the Special Master after further consultation with the JWG. After the JWG submits its final report on remedies, counsel to the parties will be provided an opportunity to submit a brief to the Special Master discussing the report of the JWG. The Special Master will review the report of the JWG and the briefs submitted by counsel in deciding whether to approve the report and specific recommendations of the JWG.

Third, a conference call to discuss the findings of the JWG shall be scheduled for 8:00 p.m. EDT (5:00 p.m. PDT) on July 21, 1998. The Co-Chair of the JWG or their representatives shall be available for this conference call. The

purpose of this conference call will be to receive a report on the findings of the JWG concerning compliance or noncompliance with the load factor requirements. If the JWG reaches impasse and cannot agree on a finding, the parties will discuss follow-up requirements in accordance with the following schedule.

Fourth, if the JWG reaches impasse on the issue of compliance with the decree, the parties shall have an opportunity to conduct discovery on the question of compliance as well as the remedies to be fashioned in the case of non-compliance. Discovery shall commence on July 24, 1998 and shall close on August 11, 1998.

Fifth, the parties shall fully brief the issues raised in this consolidated Stage I and Stage II proceeding after the close of the discovery period. The plaintiffs' opening brief shall be faxed no later than August 18, 1998. The defendants' opposition brief shall be faxed on September 1, 1998; the plaintiffs' optional reply shall be faxed on September 4, 1998.

Sixth, if on July 21 the JWG is granted additional time to meet and consider the degree of noncompliance and the specific remedies required, and thereafter reaches an impasse on these issues, the Special Master will establish a new schedule for discovery and briefing of these issues.

Dated: 6/29/98

/s/ Donald T. Bliss
Donald T. Bliss
SPECIAL MASTER

June 29, 1998 Procedural Order of the Special Master

PROOF OF SERVICE

The foregoing document described as PROCEDURAL ORDER, IN RE LOAD FACTOR COMPLIANCE has been served on June 29, 1998, via the United States Postal Service by first-class, pre-paid mail in sealed envelopes to the following parties:

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June 29, 1998 Procedural Order of the Special Master

Copies of the foregoing have been provided by facsimile to Mr. Kenneth Klein/Mr. David Kelsey/Gabriela Mejia and Ms. Constance Rice/Mr. Richard Larson.

/s/ Donald T. Bliss
Special Master

July 15, 1998 Memorandum Decision and Order of Special Master Re Standards for Compliance

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS

LABOR/COMMUNITY STRATEGY CENTER, et al.,	Case No. CV 94-5936 TJH (MCx)
Plaintiffs,	**IN RE LOAD FACTOR COMPLIANCE**
vs.	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE,	**ORDER RE STANDARDS FOR COMPLIANCE**
Defendants.	

MEMORANDUM DECISION AND ORDER

On June 24, 1998, the parties agreed to brief simultaneously the foundational legal issue of the appropriate standard by which the Special Master is to measure and determine compliance with the target load factor requirements set forth in Section II.A.1. of the Consent Decree. *(See* Procedural Order, dated June 29, 1998.) Having reviewed the plaintiffs' and defendants' briefs, in conjunction with the record

in this proceeding, I make the following legal and factual findings:

I. SUMMARY OF FINDINGS

A. Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis.

B. For the purpose of determining compliance with the Consent Decree, the Joint Working Group (JWG) should utilize the fixed 20-minute periods established by MTA procedures.

C. The Consent Decree does not require MTA to incorporate by-passed passenger data into its compliance calculations.

D. Section II.B. of the Consent Decree envisions that MTA eventually will procure 102 buses in addition to the buses purchased for replacement purposes.

These findings are explained in more detail in the following section.

II. LEGAL ANALYSIS

A. The Consent Decree Requires Compliance For All Nonexempt Bus Routes, Measured On A Line-By-Line Basis.

The operative provision of the Consent Decree which governs the standard for compliance states, in relevant part:

> "MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this Consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):
>
> "December 31, 1997, 1.35 . . . ."

(Section II.A-1. (emphasis added).) This terminology -- requiring reduction of load factor ceilings for "all bus routes" -- is consistently used throughout Section II of the Consent Decree. For example, Section II.A.4. states:

> "If MTA fails to meet the target load factors for all bus lines by the dates specified in paragraph 1 above . . . MTA shall meet the target as soon as possible . . . ."

(emphasis added).

This framework is further supported by the language and purpose of Section II.A.2., which defines "Peak load factor" as the total number of passengers divided by the total number of seats "during any 20 minute weekday peak period in the peak direction of travel on each bus line." (emphasis added). Since the measure -- "peak load factor" -- is defined by reference to "each" individual bus line, and since Section II.A.2 requires compliance for "all bus routes," the ordinary meaning of these terms, taken together, requires compliance for each and every bus line. There is no language in the Consent Decree which provides for the possibility of averaging across multiple lines.

Section II.A.3. provides two specific ways of exempting specific bus lines from the load factor reduction requirements. First, if ridership increases by more than 15 percent on any bus line, MTA may defer the target on that line for one year. Second, the Consent Decree provides that "the JWG [Joint Working Group] will designate a list of bus lines which may be exempted from the load factor reduction requirement, such as lines with low frequency service." Apparently, MTA has not invoked the first exception, and the JWG has not specifically designated a list of bus lines to be exempted.[1]

Reading these sections together, I have concluded that MTA is obligated by Section II.A.1. of the Consent Decree to meet the December 31, 1997 target load factor of 1.35 on all nonexempt bus routes, measured on a line-by-line basis.

In the absence of ambiguity, a court will interpret a contract or statute according to the clear, explicit meaning of the words used. *See e.g., Avemco Ins. Co. v. Davenport,* 140 F.3d 839, 842 (9th Cir. 1998); *Perrin v. United States,* 444 U.S. 37, 42 (1979). The preceding provisions allow for only one common meaning: compliance with the load factor ceiling is

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[1]Although the JWG has not specifically listed exempt lines, it was noted at the status conference on June 24, 1998 that there are a number of lines for which sufficient and timely monitoring data i.e., point checks) had not been obtained in order to concentrate monitoring resources on the 77 most traveled lines. This approach, which was discussed by counsel to both parties and the Special Master at a previous informal conference, essentially means that the data are available for measuring compliance on approximately 77 lines.

required for all bus routes except those exempted under the provisions of II.A.3.

The MTA suggests that the standard for compliance should be a measurement of MTA's overall compliance rate, per time period, against the industry-wide percentage of service interruptions. In effect, MTA argues for a percentage "cushion" equal to the industry-wide rate of interruptions for each time period. While MTA presents a thoughtful and analytical case for the complexities and difficulties of achieving the target load factors, which apparently were not fully understood by MTA at the time it entered into the Consent Decree, there are several problems with the approach it now suggests. First, there is no support for this standard in the language of the Consent Decree itself, which clearly refers to"all bus routes" and "all bus lines" and measures performance on "each bus line." Second, MTA's proposal assumes that a service interruption on a particular line will automatically cause the load factor to be exceeded for that line. Although it may be that an exceedence of the ceiling is more likely under such circumstances, as an empirical matter MTA has not -- and probably cannot -- establish that every service interruption leads inevitably to exceeding the target. Finally, even if these factors were co-extensive, the Consent Decree does not excuse a failure to meet the load factor ceiling merely because of service interruptions. Equipment malfunctions, traffic, weather and other variables are contingencies which were known at the time of the execution

of the Consent Decree and therefore must be taken into consideration in planning for compliance with the load factor ceilings.[2]

MTA does not dispute "that the target load factor requirements are applicable to all of its bus routes." (MTA Reply at 1.) However, MTA does dispute "the contention that if the load factor target of 1.35 is not achieved in any single 20-minute time period, then the MTA is in breach of the Consent Decree." (*Id.*) MTA contends that while the Consent Decree describes how to compute the peak load factor, it does not explicitly state that failure to obtain the 1.35 load factor ceiling in any 20-minute period constitutes a breach. Consequently, MTA contends that the Special Master has some discretion to determine what is reasonable compliance, in order to avoid a harsh and unreasonable result.

While MTA's contentions and concerns are not without merit, it should be noted that the Consent Decree does build-in some flexibility for MTA in meeting the load factor targets:

- The 20 minute period (for peak periods) and one-hour period (for nonpeak periods) is an average of all buses travelling on a bus route

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[2]MTA cannot be heard to argue that to comply with these requirements it will have to achieve a load factor well below the 1.35 initial target. While this may be the case for some bus lines, the load factor targets are ceilings and MTA is required to take all feasible steps to ensure that they are not exceeded. In any event, since the MTA is required to meet even stricter targets in the future, such steps will be necessary to meet these later requirements.

during the specified time period. Thus, individual buses may exceed the load factor without exceeding the target if the average of all buses on that particular route in the period meets the target.

- MTA may defer the target for a year for any line on which the ridership increases by more than 15 percent.
- The JWG is directed to designate a list of exempted buses.
- The Consent Decree expressly reserves to MTA "the discretion in determining how the targets will be met." (Section II.A.3.)

In addition, plaintiffs acknowledge that there are circumstances where MTA would be excused from compliance with the performance standard in Section II.A.1. and that enforcement action would not be appropriate for *de minimis* noncompliance. *(See* Plaintiffs' Opening Brief at 15, n. 11.)

I agree that the language of the Consent Decree affords the Special Master some discretion in fashioning a remedy where the failure to meet the target load factor is *de minimis.* This is consistent with the well-established principle that courts have discretion to deny a remedy where the noncompliance is *de minimis. See Withrow v. Concannon,* 942 F.2d 1385, 1388 (9th Cir. 1991)(district courts have discretion to deny injunctive relief where noncompliance is *de minimis); see also Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985). Accordingly, the JWG is directed to develop and apply an appropriate *de minimis* standard which should reflect the understanding that certain bus

lines, which may not exhibit consistent indicia of overcrowding, may nevertheless fail to meet the load factor target on a few, isolated occasions. A *de minimis* standard is intended to obviate an immediate remedial plan for specific bus lines where the periods in which the load factors are exceeded are infrequent, likely attributable to unique and nonrecurring circumstances or events, and not reflective of a continuing condition of overcrowding. Bus lines which meet these *de minimis* criteria, while technically falling short of the target load factor, will not require immediate remedial or enforcement action.[3]

If the JWG cannot agree on a *de minimis* standard, then each Co-Chair of the JWG shall recommend an appropriate *de minimis* standard and shall submit separately a list of bus lines that qualify for *de minimis* treatment.

In sum, a determination as to whether MTA is in compliance with the target load factor requirement of Section II.A.1. of the Consent Decree should be made on a line-by-line basis. Where there is sufficient and timely monitoring data which show that the target has been exceeded on a specific line, other than on an exempt line, then the MTA is not in compliance with respect to that line. If MTA fails to meet the 1.35 load factor requirement on specific lines, then (except for *de minimis* noncompliance) a remedy must be fashioned that

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[3] Bus lines which meet these criteria shall be placed on a "watch list" and monitored closely thereafter. If they exceed the target load factors in excess of the *de minimis* standard they will be designated for remedial action.

would enable MTA to achieve and maintain compliance with respect to that line and to meet future targets.

In its briefs and accompanying Declarations, MTA has raised a number of important concerns and issues. MTA has shown the difficulty of meeting the load factor targets during peak periods where there are service disruptions. MTA has further described the specific problems that have occurred with the fleet of 200 ethanol and 500 CNG buses and the steps that are being taken to remedy these problems and add more reliable capacity to the fleet. Finally, MTA has indicated that significant progress has been made in achieving the load factor targets during the first two quarters of this year.

If, after applying the standards set forth in this Order, it is determined that MTA has not met the December 31, 1997 load factor targets and has not subsequently come into compliance with the targets with respect to specific bus routes, then the analysis and concerns set forth by MTA will be given careful and thorough consideration in designing a remedy that is practical, feasible, and reasonable.

B. The Load Factor Shall Be Calculated Using The 20-minute Fixed Peak Periods Already Utilized By The MTA.

The parties dispute whether the 20-minute peak period should be calculated using a "sliding window" approach or the fixed 20-minute periods utilized by the MTA. Section II.A.2. provides that "MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules." During an informal conference with the Special Master, it was decided to apply most of the limited resources available to the collection of point check data. *(See* Plaintiffs' Opening Brief at

3, n.2.) MTA states -- and the plaintiffs apparently do not dispute -- that its "procedures and schedules in existence at the time of the negotiation of the Consent Decree[,] and for at least ten years prior to the Consent Decree[,] used fixed 20-minute intervals." (MTA Opening Brief at 11 (citation omitted).) Since MTA was obligated to meet the target load factors, it was important to MTA to know the basis upon which the data would be collected and used in determining compliance. On the other hand, it was important to plaintiffs that MTA supply the JWG with all such data and that the JWG be informed of "any change in data gathering/processing procedures." (Section II.A.2. (emphasis added).) The use of the term "any 20 minute weekday period" does not implicitly incorporate the concept of a "sliding" or "rolling" 20-minute period, but rather refers to the determination of the peak load factor by computing the highest ratio of any of the 20-minute periods for which the data were collected pursuant to the MTA collection procedures at the time.

Thus, for the purpose of determining compliance with the load factor targets on a line-by-line basis, it is appropriate to refer to the 20-minute periods established by MTA procedures. This does not mean, however, that computations based on a sliding 20-minute period would be inadmissible or that such data would not be useful in addressing other issues in this proceeding.

C. The Consent Decree Does Not Require The MTA To Include Data On ByPassed Passengers.

The parties have raised the question of whether or not the MTA is required under the Consent Decree to incorporate

data on by-passed passengers in calculating its load factors. The Consent Decree does not contain any provision which explicitly requires the MTA to incorporate by-passed passenger data into its compliance calculations.

Section II.A.2. provides that "[t]arget load factors shall not be achieved by-passing passengers at bus stops." This provision prohibits MTA from intentionally by-passing passengers as a means of achieving compliance with the load factor targets. If plaintiffs make a showing, either through data or other extrinsic evidence, that the MTA is engaging in such practices, at that point the Special Master will consider what remedies or sanctions are appropriate. In the absence of such evidence, however, the MTA will not be required to incorporate such data into its compliance calculations. Collecting and using accurate by-pass data is a complex process. A passenger standing at a bus stop may not board a specific bus because he or she is waiting for another bus line that shares the same stop or because the passenger prefers to take a less crowded bus that follows closely behind or because the person is waiting to greet a disembarking passenger. Given the inherent problems with by-passed passenger data, it would not be fair to include such data in the compliance calculations except where there is evidence that operators are intentionally by-passing passengers in order to meet the load factor targets.

D. The MTA Is Required Under The Consent Decree Eventually To Purchase 102 Additional Buses.

In the Preliminary Views of the Special Master Based on Informal Briefing (March 12, 1997), the Special Master expressed preliminary views about the requirement in Section

II.B. concerning 102 additional buses. At that time, it was apparent that MTA could not satisfy this requirement by procuring 102 additional new buses within the short deadlines provided by the Consent Decree. Thus, the practical solution was to add to overcrowded routes serving the transit-dependent new buses that were already on order as replacement buses and to extend for a reasonable period of time the life of the buses that were scheduled for phase-out.

To comply fully with the express terms of Section II.B., however, it was always envisioned that the MTA eventually would procure the additional buses agreed upon in the Consent Decree since both parties recognized that the buses scheduled for replacement were near the end of their life cycle. No time was set for the procurement of an additional 102 buses that would enable MTA to phase out the buses originally scheduled for replacement while maintaining the net addition of 102 buses in the fleet. If it is determined that MTA has not met the target load factor on certain lines, it would be appropriate to consider whether the time is now ripe for the procurement of the net addition of 102 new buses, if MTA has not done so already.

WHEREFORE, it is hereby Ordered that:

1. A copy of this Memorandum Decision and Order shall be provided to the Co-Chair of the Joint Working Group ("JWG") who shall convene a meeting of the JWG to determine whether MTA has met the load factor targets set forth in Section II.A.1. of the Consent Decree.

2. The Co-Chair of the JWG shall report to the Special Master on the form attached as Exhibit A hereto on or before 2:00 p.m. PDT on July 21, 1998.

3. A conference call is scheduled for 5:00 p.m. PDT on July 21, 1998 to set a schedule for subsequent action based on the report of the JWG.

/s/ Donald T. Bliss
Donald T. Bliss
SPECIAL MASTER

Dated: 7/15/98

July 15, 1998 Memorandum Decision and Order of Special Master Re Standards for Compliance

EXHIBIT A

The Joint Working Group met on _____, 1998 from _____ to _____ . The members of the JWG have reviewed the Memorandum Decision and Order of the Special Master, dated July 15, 1998. Based on the review and advice of the JWG, as Co-Chair of the JWG, we have made the following findings, as evidenced by our initials below.

_____ We have determined that MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1. of the Consent Decree.

_____ We have determined that MTA has not met the load factor reduction target of 1.35 set forth in Section II.A. of the Consent Decree with respect to certain bus lines.

_____ We cannot agree as to whether MTA has met the load factor reduction target of 1.35. We therefore have reached impasse.

_____ MTA has not met the load factor targets on the following nonexempt bus lines (bus lines which did not meet the load factor targets but met the *de minimis* standard are to be included but may be identified separately): _____

_____

_____

_____

_____

_____.

_____ In determining that the target exceedence for certain bus lines is *de minimis* for purposes of remedy, we have adopted the following *de minimis* standard: _____
_____
_____.

_____ We did not agree on a *de minimis* standard. We have attached hereto *de minimis* standards recommended by each of the Co-Chairs and a list of bus lines that would qualify as *de minimis* under each respective standard.

_____ _____
Co-Chair Co-Chair
for _____ for _____

_____DATE/TIME

PROOF OF SERVICE

The foregoing MEMORANDUM DECISION AND ORDER IN RE: LOAD FACTOR COMPLIANCE/ORDER RE STANDARDS FOR COMPLIANCE has been served on July 15, 1998, via the United States Postal Service by first-class, pre-paid mail in sealed envelopes to the following parties:

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Copies of the foregoing have been provided by facsimile to Mr. Kenneth Klein/Gabriela Mejia, Mr. David Kelsey/Ms. Nina Webster, and Ms. Constance Rice/Mr. Richard Larson.

/s/ Donald T. Bliss
Special Master

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS

LABOR/COMMUNITY STRATEGY CENTER, et al.,	)	Case No. CV 94-5936 TJH (MCx)
Plaintiffs,	)	**IN RE LOAD FACTOR COMPLIANCE**
vs.	)	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE,	)	
Defendants.	)	

ORDER RE PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE SPECIAL MASTER'S JULY 15, 1998 ORDER RE COMPLIANCE STANDARDS

BACKGROUND

Under Section II.A.1. of the Consent Decree, the MTA was required, by December 31, 1997, to reduce the maximum

load factor ceiling for all bus routes to 1.35. Some four months later, on May 1, 1998, counsel for plaintiffs' class filed a procedural motion before the Special Master seeking to consolidate Stage I and Stage II proceedings and to open a period of discovery to determine whether MTA has complied with the terms of the Consent Decree. MTA opposed the motion, seeking instead informal consultations in accordance with the procedures set forth in the Consent Decree. Because plaintiffs argued that informal discussions would be unproductive and because of the need to expedite resolution of the compliance issue, the Special Master granted the motion to consolidate on May 28, 1998 and requested the parties to clarify in writing the outstanding issues to be resolved. A status conference with the parties was held on June 24, 1998 for the purpose of narrowing the issues and setting an expedited briefing schedule.

In their submissions to the Special Master and at the June 24 status conference, the parties disputed the legal and factual standard under which MTA's compliance with the Decree is to be measured. It was determined that if this threshold legal issue was resolved first and the legal standard clarified, the Joint Working Group (JWG) established by the Consent Decree would be directed to determine whether MTA was in compliance with the December 31, 1997 load factor target. Accordingly, on June 29, 1998, the Special Master issued a Procedural Order directing the parties to submit, by July 8, 1998, simultaneous legal briefs addressing the foundational legal question (and various related sub-issues) concerning the proper standard by which to measure compliance under the Consent Decree.

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

The briefings submitted by the parties presented vastly different interpretations of the compliance standards under the Decree. The MTA contended that the standard for compliance should be a measurement of MTA's overall system-wide compliance rate, per time period, against the industry-wide percentage of service interruptions. The MTA also argued for a computation of the load factor using the fixed, 20-minute periods that MTA has consistently used in collecting data, and contended that the MTA was not required under the Decree to keep data on by-passed passengers. Conversely, the plaintiffs' class argued that the plain meaning of the Decree requires compliance to be measured for "all bus routes" using a sliding window for "any 20-minute period." Plaintiffs also argued that the MTA was required to keep data on by-passed passengers to ensure that it was not achieving the targets through these means.

After receiving the parties' opening and reply briefs, the Special Master issued a Memorandum Decision and Order on July 15, 1998 (the "July 15 Order"). The July 15 Order rejected MTA's "system-wide" averaging approach to compliance and stated that Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis. The Special Master also ruled that compliance is to be measured using the fixed, 20-minute periods consistently used by the MTA at the time the Consent Decree was negotiated and for at least ten years prior thereto, noting that the sliding 20-minute period could be "useful in addressing other issues in this proceeding." The Special Master further ruled that the MTA was prohibited under the Decree from intentionally by-passing

passengers to achieve compliance, although it was not required to gather these data in its load factor computations. The July 15 Order directed the JWG to convene and, applying this standard, determine whether MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1 of the Consent Decree and, if the target has not been met, to specify the specific bus lines that did not meet the target. Since a single 20-minute violation would cause a bus line (and MTA) to be in violation of the Consent Decree, even if the violation occurred because of an extraordinary event on an otherwise uncrowded line, the JWG, which includes the technical expertise on bus operations as well as compliance monitoring, was instructed to consider, after listing any noncompliant lines, what type of *de minimis* standard could be applied during the remedy phase of this proceeding to eliminate the immediate need to remedy extraordinary situations not reflecting other indicia of overcrowding. Contrary to the plaintiffs' contention (Pls. Recon. Br., p. 4), however, there was to be no *de minimis* exception from the finding of noncompliance. The JWG was directed to report its findings on compliance in accordance with this standard on or before 2:00 p.m. PDT on July 21, 1998.

Shortly after the July 15 decision, counsel for the plaintiffs indicated their intention to move for reconsideration of the July 15, 1998 Order, and requested that the meeting of the JWG be postponed until after reconsideration. In a July 24th letter, plaintiffs submitted an agreed-upon briefing schedule. On August 14, 1998, plaintiffs filed their reconsideration brief. Plaintiffs did not dispute the fundamental ruling in the July 15, 1998 Order that Section II.A. of the Consent Decree requires MTA to reduce "the maximum load

factor ceiling" to 1.35 on all "bus lines" and that there is no language in the Consent Decree that provides for "averaging across multiple lines." However, plaintiffs contended that the July 15, 1998 Order was in error on the grounds that: (1) any mention of the possible application of a *de minimis* standard is premature; (2) the Consent Decree requires the MTA to utilize a "sliding window" rather than the MTA's "fixed" 20-minute periods; (3) the Consent Decree's "by-pass" provision does not require a finding that the MTA "intentionally" by-passes passengers; (4) the July 15 Order improperly limited potential remedies to a line-by-line approach; and (5) that the stipulated facts require a finding that the MTA has breached the Decree by failing to procure an additional 102 buses. The plaintiffs also moved to strike, as improper extrinsic evidence, MTA's declarations submitted in support of its earlier briefs on the compliance issue.

In response, the MTA filed its opposition brief on August 21, 1998, contending that the Special Master's July 15 Order is legally supportable, and that plaintiffs have not made the requisite showing for reconsideration under U.S. Central District Local Rule 7.16. The MTA also moved to strike the declaration of Thomas Rubin as extrinsic evidence. On August 24, plaintiffs filed a reply in support of their petition for reconsideration.

Upon consideration of the parties' opening briefs and the plaintiffs' reply brief, as well as the evidence in the record, I make the following findings and conclusions of law, granting in part, and denying in part, plaintiffs' motion for reconsideration:

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

FINDINGS AND CONCLUSIONS

1. Where, as here, a ruling is non-final, a court has discretion to reconsider its prior decision. *See Pyramid Lake Paiute Tribe of Indians v. Hodel,* 882 F.2d 364, 369 n.5 (9th Cir. 1989). Moreover, under Section V.B. of the Consent Decree, the Special Master may establish appropriate procedures. Although I am concerned about the additional delay in addressing the issue of MTA's compliance with the load factor targets, I have reviewed the petition for reconsideration and MTA's response and have decided to make certain modifications and clarifications to my prior Order, primarily to simplify and expedite resolution of the compliance phase of this proceeding and to move on, if necessary, to the remedy phase.

2. The fundamental holding of the July 15 Order is hereby reaffirmed. Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis. Where there is sufficient and timely monitoring data which show that the target has been exceeded on a specific line, other than on an exempt line, then the MTA is not in compliance with respect to that line. Since the Consent Decree requires MTA to meet the load factor target for all nonexempt bus lines, the failure to meet the target on any specific nonexempt line constitutes noncompliance with a requirement of the Decree.

3. The legal findings in the July 15, 1998 Order were intended to deal solely with the threshold legal standard by which *compliance* is to be measured; they did not purport to

resolve any remedial issues. The references to the potential application of a *de minimis* standard (a power which the parties do not dispute is available to the Court) were intended to initiate discussions by the JWG and to obtain its expert advice for purposes of possible application to a future remedial determination, if necessary and appropriate, at a later stage and after full legal briefings and evidentiary findings. Plaintiffs have expressed great concern that the July 15 Order may have anticipated remedial issues collateral to the question of compliance -- issues which the parties have not yet briefed. Since there will be ample opportunity to address and brief fully this issue, if necessary, at a subsequent remedial stage of this proceeding, I am hereby deleting all references and directives in the July 15 Order relating to the *de minimis* standard.

4. Contrary to plaintiffs' contention (see Pls. Recon. Br., pp. 4-6), the July 15 Order did not limit the type of relief that may be appropriate if a finding of noncompliance is made. The Consent Decree requires that *compliance* be measured on a line-by-line basis, not that any *remedy* be solely limited to a line-specific remedy. The appropriate forms of remedy will be the subject of subsequent proceedings, if necessary.

5. Section II.A.2 of the Consent Decree is silent on how the "20-minute peak period" is to be specifically computed. In the July 15 Order, the Special Master concluded that the "20-minute peak period" referenced in the Decree should be calculated using the fixed 20-minute periods utilized by the MTA. This finding was based primarily upon Section ILA..2., which provides that: "MTA shall conduct ride checks to determine load factors using current MTA procedures and

schedules." Upon further reflection and analysis of this provision, however, it appears that this provision does not fully resolve the ambiguity in this section. The participial phrase "using current MTA procedures and schedules" grammatically refers to and modifies the predicate "shall conduct ride checks"; it does not grammatically modify the infinitive phrase "to determine load factors." This distinction is significant because the task of actually "conducting" the ride checks (or point checks) -- the act of counting the number of standing passengers at the specific time that a bus reaches a bus stop -- does not involve any application of or reference to a 20-minute period. Thus, this provision relating to the procedures used in *gathering* the data is not necessarily relevant to the question of how the raw data are analyzed for purposes of computing the load factors.

The controlling provision to be interpreted simply states:

> "'Peak load factor' shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 ***minute weekday peak period*** in the peak direction of travel on each bus line."

Consent Decree, Section II.A.2 (emphasis added). Since there is no definition of "any 20-minute weekday peak period" in the Decree, I have looked to the sparse case law for precedent that may be helpful in resolving this ambiguity. In *Young v. Kwock*, 474 P.2d 285 (Haw. 1970), plaintiffs elected to rescind a securities sale under Hawaii's Blue Sky Law. One of the

defendants attempted to assert a statutory exemption for: "Any transaction pursuant to an offer directed by the offeror to not more than twenty-five persons . . . during *any period of twelve consecutive months* . . . ." *Id.* at 287 (emphasis added). This defendant argued that "any period of twelve consecutive months" referred to a fiscal year. The Hawaii Supreme Court rejected this argument, holding that the language referred without limitation to "any period" of twelve months. *Id.* Thus, the Court implicitly acknowledged the use of a sliding window as the plain and unambiguous interpretation of the term.[1]

Ultimately, even if both interpretations of the term "any 20-minute period" are regarded as equally plausible, the "sliding window" appears to be more consistent with the purpose of the Decree. The Special Master has repeatedly emphasized that one of the central purposes of the Decree is to improve service and reduce overcrowding for the transit-dependent of Los Angeles. *See also* Consent Decree, Section 1. The "sliding window" approach differs from the fixed periods method by the significant fact that, under the former approach, more load factors are computed for each bus route. Since it is likely that a greater sample size would increase the accuracy of the prediction, the "sliding window" method provides a more accurate assessment of the overcrowding conditions in the bus

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[1] This conclusion is consistent with the Ninth Circuit holding in *Reconstruction Finance Corp. v. Chromium Products Corp.*, 202 F.2d 664, 666 (9th Cir. 1953) that the term "any restriction" is not confined to a "single kind" of restriction.

routes being measured.[2]

Moreover, under Cal. Civ. Proc. Code § 1864, "when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made." *See also Sutherland v. Barclays Am./Mortgage Corp.*, 53 Cal. App. 4th 299, 61 Cal. Rptr. 2d 614 (1997)(where parties' competing interpretations of stop provision were equally plausible, agreement was interpreted in favor of borrower in whose favor agreement was made). Clearly, the persons in whose favor the Decree was made -- the transit-dependent of Los Angeles -- are most favored by an interpretation which measures compliance by a more comprehensive standard of measurement.

Accordingly, the Special Master grants plaintiffs' motion on this issue and hereby adopts the 20-minute "sliding window" approach as the governing interpretation of "peak load factor" for the purpose of computing compliance under Section II.A.2

6. The July 15 Order stated that Section II.A.2. "prohibits MTA from *intentionally* by-passing passengers as a means of achieving compliance with the load factor targets." July 15 Order, p.11 (emphasis added). Plaintiffs correctly point out that Section II.A.2. of the Decree makes no reference to the

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[2] Indeed, one of the MTA's representatives to the JWG has candidly admitted that "ideally it should be a sliding 20-minute window." *See* Reporter's Transcript of [JWG] Proceedings, May 27, 1997, 63:4-5.

intent of the MTA in stating that "[t]arget load factors shall not be achieved by by-passing passengers at bus stops."

Nonetheless, the Decree does not explicitly require the MTA to keep data on by-passed passengers. If the plaintiffs wish to present data showing that passengers are being by-passed (whether intentionally or not), and that such data, if included in the computations, would have the effect of showing noncompliance with the load factor targets for certain bus lines, such data will be considered in subsequent proceedings on noncompliance. However, the possibility that plaintiffs may introduce such evidence in the future will not be cause for delay in the present proceedings.[3]

7. Extrinsic evidence supporting an interpretation to which an agreement is not reasonably susceptible is not admissible. *Barris Indus., Inc. v. Worldvision Enters., Inc.*, 875 F.2d 1446 (9th Cir. 1989). The declarations of Dana Woodbury and Harold Hirsch, submitted by the MTA on July 8, 1998, constitute such inadmissible extrinsic evidence because they support MTA's unreasonable interpretation that the Consent Decree requires compliance based on an averaging across all bus routes. Contrary to plaintiffs' contentions, I did not rely on such evidence in providing a threshold legal interpretation of the compliance issue, but suggested that this type of evidence could be considered in a remedial phase of this proceeding. I

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[3]If evidence is subsequently presented on this issue, and if the Special Master makes findings of noncompliance based thereon, any remedies can be considered at that time.

am therefore granting plaintiffs' motion to strike this evidence from the record at this time, without prejudice to MTA's right to introduce this evidence at a subsequent remedial stage, if necessary. Consequently, the August 14, 1998 Declaration of Thomas Rubin is also stricken (subject to the same right to re-introduce) because such evidence was submitted by the plaintiffs solely to rebut the extrinsic evidence of Woodbury and Hirsch.

8. Without additional factual information, the Special Master is not prepared at this time to issue a finding of compliance or noncompliance on the issue of the 102 buses. The Special Master's March 12, 1997 Preliminary Views did not establish any specific deadline for the purchase of the buses. As stated in the July 15 Order, this issue will be addressed in conjunction with a subsequent remedial stage, if necessary, or upon the development of an appropriate factual record.

IT IS HEREBY ORDERED THAT:

1. All references and directives in the July 15 Order relating to the *de minimis* standard are hereby STRICKEN. The issue will be fully briefed at a subsequent stage of this proceeding, if necessary.

2. Plaintiffs' motion for reconsideration on the issue of the "sliding window" is hereby GRANTED. The Special Master hereby adopts the 20-minute "sliding window" approach as the governing interpretation of "peak load factor" for the purpose of determining compliance under Section II.A.2.

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

3. Plaintiffs' motion on the issue of the by-passed passengers is GRANTED, in part, and DENIED, in part. The MTA is not required to keep data on by-passed passengers. However, the plaintiffs can introduce evidence that passengers are being bypassed (and that such data affect load factor computations) whether such conduct is intentional or not.

4. Plaintiffs' motion to strike the declarations of Dana Woodbury and Harold Hirsch is hereby GRANTED; MTA's motion to strike the declaration of Thomas Rubin is also GRANTED. Both parties shall have the right to reintroduce such evidence at a subsequent remedial stage, if necessary.

5. Plaintiffs' motion on the issue of the 102 buses is DENIED. The issue will be considered further at a later date upon the development of an appropriate factual record.

6. The Joint Working Group shall meet as soon as possible to review the load factor monitoring data and report its findings to the Special Master as to whether or not the MTA is in compliance with the 1.35 load factor reduction target set forth in Section II.A.1. of the Consent Decree, as interpreted in the Special Master's Order of July 15, as modified by this Order of August 25, 1998. The JWG shall report its findings to the Special Master by facsimile on the form attached at Exhibit A on or before September 4, 1998, unless an extension is granted upon specific request to the Special Master.

IT IS SO ORDERED

Dated: August 25, 1998

/s/ Donald T. Bliss
Donald T. Bliss
SPECIAL MASTER

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

EXHIBIT A

The Joint Working Group met on _____, 1998 from _____ to _____ . The members of the JWG have reviewed the Memorandum Decision and Order of the Special Master, dated July 15, 1998, and the modifications to that Order dated August 25, 1998. Based on the review and advice of the JWG, as Co-Chair of the JWG, we have made the following findings, as evidenced by our initials below.

_____ We have determined that MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1. of the Consent Decree.

_____ We have determined that MTA has not met the load factor reduction target of 1.35 set forth in Section II.A. of the Consent Decree with respect to certain bus lines.

_____ We cannot agree as to whether MTA has met the load factor reduction target of 1.35. We therefore have reached impasse.

_____ MTA has not met the load factor targets on the following nonexempt bus lines (bus lines which did not meet the load factor targets but met the *de minimis* standard are to be included but may be identified separately): _____

_____

_____

_____

_____

_____.

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

_____ In determining that the target exceedence for certain bus lines is *de minimis* for purposes of remedy, we have adopted the following *de minimis* standard: _____

_____

_____.

_____ We did not agree on a *de minimis* standard. We have attached hereto *de minimis* standards recommended by each of the Co-Chairs and a list of bus lines that would qualify as *de minimis* under each respective standard.

_____ _____

Co-Chair Co-Chair

for _____ for _____

_____DATE/TIME

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

PROOF OF SERVICE

The foregoing ORDER RE PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE SPECIAL MASTER'S JULY 15, 1998 ORDER RE COMPLIANCE STANDARDS IN RE LOAD FACTOR COMPLIANCE has been served on August 25, 1998, via the United States Postal Service by first-class, pre-paid mail in sealed envelopes to the following parties:

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/s/ Donald T. Bliss
Special Master

July 9, 1998 MTA Brief re Load Factor Compliance

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
STAGE II PROCEEDING BEFORE SPECIAL MASTER
DONALD T. BLISS, JR

Labor/Community Strategy Center, et al.,	)	Case No. CV
	)	94-5936 TJH
Plaintiffs,	)	(MCx)
	)	
v.	)	**In re Load**
	)	**Factor**
Los Angeles County Metropolitan	)	**Compliance**
Transportation Authority, *et al*,	)	
	)	**The MTA's**
Defendants.	)	**Brief re**
	)	**Load Factor**
	)	**Compliance**
	)	**Standard**

July 9, 1998 MTA Brief re Load Factor Compliance

TABLE OF CONTENTS

I. INTRODUCTION ..... [45a]

II. THE STANDARD BY WHICH TO MEASURE COMPLIANCE WITH THE TARGET LOAD FACTOR IS BY COMPARING THE MTA'S PERFORMANCE WITH AN ESTABLISHED "BENCHMARK" IN THE INDUSTRY ..... [46a]

A. No Operator Can Replace Lost Service Within 20 Minutes ..... [48a]

B. Scheduling Additional Service Imposes An Unreasonable Expense And Burden On The MTA ..... [49a]

C. A Peer Benchmark Is The Most Appropriate And Reasonable Standard To Measure The MTAs Compliance With The Target Load Factor ..... [49a]

D. The MTA's Past Performance ..... [51a]

E. Evaluating the MTA's Performance .. [53a]

F. The Criteria Adopted by the Special Master Should Not be Based on an Analysis of Individual Bus Lines .... [56a]

July 9, 1998 MTA Brief re Load Factor Compliance

III. THE CURRENT PLANS TO ADD BUSES AND MAKE CHANGES IN OPERATIONS AND MAINTENANCE WILL SIGNIFICANTLY IMPROVE THE MTA'S OVERALL PERFORMANCE AND TARGET LOAD FACTOR ..... [56a]

IV. THE MTA MAY DETERMINE THE LOAD FACTOR WITHOUT DATA ON "BY-PASSED" PASSENGERS ..... [58a]

A. The Consent Decree Permits The MTA To Use Its Own Procedures To Determine The Load Factor ..... [58a]

B. There Is No Allegation Or Demonstration That The MTA Is By-Passing Passengers ..... [58a]

C. There Is No Proper Method To Collect Data On By-Passed Passengers ..... [59a]

D. The Common Practice In The Industry Does Not Include Accumulating Data On By-Passed Passengers In Determining the Load Factor ..... [60a]

V. THE MTA MAY DETERMINE THE LOAD FACTOR BY ANALYZING/CATEGORIZING MONITORING DATA INTO FIXED 20 MINUTE INTERVALS ..... [60a]

July 9, 1998 MTA Brief re Load Factor Compliance

A. The Consent Decree Permits The MTA To Use Its Own Procedures To Determine The Load Factor ..... [60a]

B. The Common Practice In The Industry Uses Fixed Time Intervals In Determining the Load Factor, Not Sliding Intervals ..... [61a]

VI. CONCLUSION ..... [62a]

July 9, 1998 MTA Brief re Load Factor Compliance

I. INTRODUCTION

The primary task for the Special Master is to devise a standard by which to determine whether the MTA has complied with the target load factor requirements of the Consent Decree. Plaintiffs argue for an "all or nothing" standard that would find the MTA in violation of the Consent Decree if it failed to meet the 1.35 requirement for any bus route during any 20 minute monitoring period. As discussed below, that standard would, in effect, force the MTA to achieve a load factor well below the required 1.35 target on most routes on most days.

The MTA, on the other hand, contends that a reasonable standard must take into account the fact that service interruptions will occur and when they do, the 1.35 target will be missed. The MTA commissioned Harold Hirsch, an esteemed transit expert who recently retired after 23 years as the head of planning for the Chicago Transit System, to consult with Dana Woodbury, who for the past 16 years has been employed by the Southern California Rapid Transit District and then the MIA, to devise a standard that is both consistent with the goals of the Consent Decree as well as with the norms of the transit industry.

That standard is set forth in this brief. While it recognizes that service interruptions are a fact of life in the transit industry, it requires that the MTA perform in a manner consistent with the industry norm. It also complies with the request of the FTA's Regional Administrator that the parties establish a "clearer, more definitive criteria for measuring compliance . . . ." See, Declaration of Dana Woodbury ("Woodbury Decl."), Exhibit "A." In short, it provides a fair standard that can and should be acceptable to all parties.

July 9, 1998 MTA Brief re Load Factor Compliance

II. THE STANDARD BY WHICH TO MEASURE COMPLIANCE WITH THE TARGET LOAD FACTOR IS BY COMPARING THE MTA'S PERFORMANCE WITH AN ESTABLISHED "BENCHMARK" IN THE INDUSTRY.

The Consent Decree states:

> 1. Improved Performance Goal: Reduced Load Factor Targets: MTA's performance in meeting this critical objective of responding to consumer demand for bus services efficiently shall be measured by the reduction in levels of crowding on board buses. MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):
>
> December 31, 1997, 1.35
> June 30, 2000, 1.25
> June 30, 2002, 1.2
>
> Thereafter, MTA shall maintain the 1.2 load factor for the duration of this Consent Decree.
>
> 2. Load Factor Definition. "Peak load factor" shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 minute weekday peak period in the peak direction of travel on each bus line. This load factor computation would be based on a one hour time interval during non-peak periods. Target load

> factors shall not be achieved by by-passing passengers at bus stops. MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules. MTA shall supply the JWG with all such data, including on-board surveys, ride and point checks and passenger surveys, throughout the year, and inform the JWG of any change in data gathering/processing procedures. The JWG may request that MTA collect additional data as appropriate to monitor compliance with the load factor targets. (emphasis added).

Despite best efforts by the MTA to schedule and operate adequate service for the purpose of sustaining average passenger loads below the 1.35 target, it is inevitable in the transit industry that some portion of service will be lost due to service interruptions. *See,* Declaration of Harold R. Hirsch ("Hirsch Decl."), ¶ 7; Woodbury Decl., ¶ 3. Service interruptions occur for a variety of reasons that are beyond the MTA's -- or any operator's -- control and include, but are not limited to: (a) equipment breakdowns, (b) accidents, (c) excessive traffic, (d) passenger illness, (e) prolonged train crossings, (f) missed pullouts, and (g) problems with schedule adherence. *Id.*

The issue is what is an acceptable level of service interruptions. *Id.* The best way to arrive at this determination is to evaluate the extent of service interruptions experienced by the MTA and compare that to the industry norm. *Id.* Such a procedure ensures that the standard will not be skewed due to the age and/or the condition of the MTA fleet. *Id.*

July 9, 1998 MTA Brief re Load Factor Compliance

A. No Operator Can Replace Lost Service Within 20 Minutes.

A service interruption in a 20 minute peak period, whether the result of a breakdown of a bus or some other cause, has a direct impact on the load factor for that 20 minute time period because in most instances, neither the MTA nor any other large operator can replace service within a 20 minute time frame. Hirsch Decl., ¶ 8; Woodbury Decl., ¶ 9. This is true because it is often impossible to reach the location where the interruption occurred, and then replace/repair the equipment and/or solve the problem, and deliver service in less than 20 minutes. *Id.* In fact, even if replacement buses were available at various locations, during peak periods, it still will take more than 20 minutes to get a replacement bus into the rotation. *Id.* By then, the damage is done in terms of maintaining the desired load factor. *Id*

An analysis was performed to determine the amount of time it would take to respond to a service interruption fast enough to avoid the loss of service capacity that would otherwise occur. *See*, Woodbury Decl., ¶¶ 6-7, Exhibit "B." Two alternatives were considered: (1) dispatching a replacement bus from the operating facility serving the impacted bus line; and (2) staging equipment and manpower at the midpoint of bus lines. *Id.* In all cases, response time was calculated as the time needed to replace the disabled bus at the point of the service interruption added to the time it then took for the replacement bus to move to the point where an observer monitors the service for purposes of determining compliance with the load factor target. *Id.*

During peak travel periods, the analysis determined that replacing service from the operating facility could never be

accomplished within a 20-minute interval. Woodbury Decl., ¶¶ 8-9. Even with staged equipment, the analysis determined that the response time would exceed 20 minutes about 86% of the time. *Id.* In short, by utilizing replacement buses the MTA cannot eliminate exceedence of the target load factor ceiling caused by service interruptions during peak travel periods on the 77 bus lines being monitored. *Id.*, Kirsch Decl., ¶ 9.

B. Scheduling Additional Service Imposes An Unreasonable Expense And Burden On The MTA.

Next, the alternative of scheduling additional service was evaluated. Woodbury Decl., ¶ 10, Exhibit "C." Based on this analysis, it was found that providing one additional bus trip in the peak direction of travel during each 20 minute period as protection against the loss of a trip from a service interruption was prohibitively expensive. *Id.* In order to provide such protection, each of the 77 bus lines being monitored for load factor compliance must have an additional trip scheduled in each of the nine 20-minute intervals spanning over a peak travel period, *i.e.*, from 6-00 a.m. to 9:00 a.m. and from 3:00 p.m. to 6:00 p.m. *Id.* This level of protection would increase the MTA'S peak service bus requirements by 33%, from 1,786 buses to 2,371 buses, Id. This level of protection is unreasonable and excessive and would force the MTA to, in effect, achieve a target load factor that, for the overwhelming majority of the time periods, is far below the 1.35 that is required by the Consent Decree. *Id*; Hirsch Decl., ¶ 10.

C. A Peer Benchmark Is The Most Appropriate And Reasonable Standard To Measure The MTA's Compliance With The Target Load Factor.

Plaintiffs will surely argue that the reason the cost of utilizing replacement buses and/or scheduling additional

service to counter the effects of service interruptions is prohibitive because the MTA's fleet suffers many more breakdowns than comparable transit operators. Since service interruptions that result in a loss of service are a statistic that is annually reported under the Federal Transit Administration's National Transit Database (formerly Section 15) program, a telephone survey was conducted of the 14 largest bus transit operators in the United States other than the MTA to determine the frequency of service interruptions.[1] Woodbury Decl., ¶ 11, Exhibit "D." Data for fiscal 15 year ("FY") 1997 was obtained from the 12 operators who responded. Each of the responding operators provided their reported number of service interruptions and annual total vehicle miles operated. *Id.*

Based on this information, the frequency of service interruptions was calculated as the ratio of total miles operated per incident of service interruption. Woodbury Decl., ¶¶ 11-12, Exhibit "E." To establish a reasonable expectation for operator performance, a weighted average mileage between service interruption incidents was calculated. *Id.* Each operator's reported total mileage was used as the weighting factor because incidents occur as a function of the quantity of service operated--if your buses travel 1,000 miles each day then they will have more frequent breakdowns than if they travel only 500 miles each day. *Id.* The results of this analysis were as

---

[1]Of those operators surveyed, Boston and Minneapolis, had numbers that contained data irregularities and Philadelphia and Pittsburgh did not respond. Due to the limited time available to determine why their numbers were so different and to convert them so that they would provide meaningful data, Boston and Minneapolis were dropped from the survey. Woodbury Decl., ¶ 11.

follows:

- The Average Miles Between Incidents for the Twelve Operators: 2,040.
- Mileage Between Incidents for the 12 Operators: 1,305 (lowest) - 3,719 (highest).
- Mileage Between Incidents for the MTA: 1,667.

When arranged in order from highest to lowest mileage between incidents, the MTA was found to rank in the middle of the lower half of the operators surveyed. *Id.*

D. The MTA's Past Performance.

Using the above weighted average frequency of service interruptions for the peer operators--and accepting the proposition that it is unrealistic to expect the MTA to replace a bus within the 20 minute monitoring period or to schedule 33% more buses than are required--the proportion of time periods the MTA would be expected to miss the load factor target is set forth below in this chart:

July 9, 1998 MTA Brief re Load Factor Compliance

		Time Period Exceeding Load Factor Target			
Day of Week	**Time Period**	**Peer Bench-mark**	**Actual MTA Q4 1997**	**Actual MTA Q1 1998**	**Actual MTA Q2 1998**
	AM Peak	3.14%	4.79%	3.83%	3.33%
	Midday	2.67%	0.38%	0.21%	0.08%
Weekday	PM Peak	2.77%	5.79%	4.11%	3.20%
	Early Eve.	3.32%	3.95%	3.46%	1.52%
	Overall	**2.90%**	**3.95%**	**2.99%**	**2.39%**
Saturday	**Overall**	**2.82%**	**2.95%**	**1.53%**	**1.25%**
Sun./Hol.	**Overall**	**2.40%**	**1.24%**	**0.38%**	**1.40%**

Note: Q2 1998 data through June 20, 1998 (12 weeks)

The survey tells us that using the industry norm, we would expect to see service interruptions in 2.90% of the time periods monitored. Woodbury Decl., ¶ 12. Because on average the number of buses monitored on each route during the peak 20 minute period is three, service interruptions--by eliminating one-third of the service for the 20 minute monitoring period--almost always will cause a failure to meet the 1.35 target. *Id.* Thus, one service interruption will cause the load target to be exceeded in the time period when the service interruption occurred.

July 9, 1998 MTA Brief re Load Factor Compliance

Therefore, if the industry norm is that we should expect service interruptions in 2.90% of the time periods monitored, then we must also expect that pursuant to the industry norm the target load factor will be exceeded in 2.90% of the time periods monitored. Woodbury Decl., ¶ 12; Hirsch Decl., ¶ 11.

The "overall" calculation establishes that the MTA's performance systemwide during the second quarter of 1998 was better than the industry benchmark (2.39% vs. 2.90%). When broken down by peak daily time periods, the MTA's second quarter 1998 performance is slightly above the peer benchmark (3.33% vs. 3.14% for AM peak and 3.20% vs. 2.77% for PM peak). Woodbury Decl., ¶ 12; Hirsch Decl., ¶ 11.

E. Evaluating the MTA's Performance

Until now, no objective standard existed by which the MTA--or anyone else--could determine whether the MTA's performance was consistent with the load factor requirements of the Consent Decree. The MTA contends that by obtaining a load factor of 1.35 or less in more than 97% of the periods monitored and by meeting the objective standard on a systemwide basis that it had complied with the Consent Decree. The plaintiffs, on the other hand, argue that failure by the MTA to achieve the target load factor in any single monitored time period was a violation of the Consent Decree.

Adoption of the criteria set forth herein would provide an objective standard to determine whether the MTA is in compliance with the Consent Decree. It would eliminate the situation that has existed up until now, which provided no objective way in which to determine whether in fact the MTA was in compliance with the Consent Decree.

July 9, 1998 MTA Brief re Load Factor Compliance

Under the vague standard existing in the Consent Decree, the MTA -- by meeting the target in more than 97% of the periods monitored -- has been in compliance with the load factor target requirements up to this point in time. If the Special Master adopts the criteria set forth herein, the MTA should be given a reasonable period of time to come into conformance with this newly proclaimed objective standard. In determining what is a reasonable period for the MTA to come into compliance with this newly proclaimed objective standard.

In determining what is a reasonable period for the MTA to come into compliance with this newly proclaimed objective standard, the Special Master must take into account certain unforeseen circumstances that -- through no fault of the MTA -- will severely hamper its ability to meet the target with respect to peak AM and PM weekday time periods in less than six months (the MTA already meets the new criteria on a systemwide basis). Specifically, the MTA has approximately 200 currently inoperable ethanol buses in its fleet as well as approximately 500 CNG buses that, while operable, are experiencing various problems that severely reduce their reliability.

Due to failures on the part of the manufacturer, the 500 CNG buses have experienced substantial problems involving fuel regulators, exhaust system failure, electronic control module failures and inability to achieve the driving range that the manufacturer had claimed they would achieve. All of these problems have been acknowledged by the manufacturer to exist and to be the fault of the manufacturer. The manufacturer is currently working together with MTA to fix each of these problems, and it is hoped that these problems will be resolved by the end of the year. Declaration of Richard Hunt ("Hunt Decl."), ¶ 4.

July 9, 1998 MTA Brief re Load Factor Compliance

Additionally, the MTA is in the process of re-powering approximately 200 inoperable ethanol buses currently in its fleet and converting them to diesel. See Declaration of Habib Balian ("Balian Decl."), ¶ 4. These 200 buses are currently not in service because their engines failed and it was not economically feasible to replace them with a similar engine. This action will add approximately 20 buses per month until completed. Moreover, the MTA is currently negotiating with the vendor performing the engine conversion to accelerate the process. As these buses are returned to active service, they will replace the oldest and least reliable buses currently in service. This will significantly improve the MTA's fleet reliability and its ability to meet the target load factor. Once again, it should be emphasized that the fact that these 200 ethanol buses are inoperable is not in any way the fault of the MTA. Hunt Decl., ¶¶ 3-5.

In short, because through no fault of the MTA, it has approximately 700 buses that are either inoperable or are experiencing service interruptions far beyond what is normal in the industry, the MTA requests that the Special Master take such unforeseen circumstances into consideration and allow the MTA six months to meet the new objective standard with respect to peak AM and PM weekday time periods, which will provide the manufacturers adequate time to rectify their mistakes. (Due to the shortage of time, it has not been possible for the MTA to provide a detailed analysis to show precisely what improvements can be expected once the problems with the 700 buses have been rectified. Should the Special Master desire such an analysis, the MTA would be happy to provide it.)

F. The Criteria Adopted by the Special Master Should Not be Based on an Analysis of Individual Bus Lines.

The standard proposed by the MTA analyzes time periods, such as AM peak, PM peak, etc., rather than individual bus lines. Woodbury Decl., ¶ 13; Hirsch Decl., ¶ 12. The reason a time period analysis is more desirable than a line-by-line analysis is that the former provides results that are much more reliable. *Id.* For example, an accident or some other unexpected event can severely affect the ability of any individual line to meet the target load factor on a given day. *Id.* Experience shows that an accident can affect not one but a number of monitoring periods and can cause a particular line to far exceed the 1.35 target. *Id.* On the other hand, by looking at various time periods, we can obtain a much more accurate understanding of whether the MTA is in fact in compliance with the 1.35 target load factor. *Id.*

III. THE CURRENT PLANS TO ADD BUSES AND MAKE CHANGES IN OPERATIONS AND MAINTENANCE WILL SIGNIFICANTLY IMPROVE THE MTA'S OVERALL PERFORMANCE AND TARGET LOAD FACTOR.

Recently, the MTA made a number of changes in the Operations Department to address issues and concerns in the areas of management and operations. Since June 8, 1998, the MTA appointed Jim Reichert as the Interim Executive Officer - Operations at the MTA. Mr. Reichert has promptly taken actions to address and improve problems with the maintenance program, on street supervision, training of operators, and accountability within the 11 divisions. *See,* Declaration of Jim

Reichert ("Reichert Decl."), ¶ 3. First, two maintenance superintendents have been added at each division to work day and might shifts. The direct effect of this addition is to increase the number of repairs that occur overnight. *Id.* This will result in more equipment availability and accessibility as the morning peak periods begin and thus reduce the number of service interruptions throughout the day caused by equipment failure. *Id.* As previously shown, the reduction of service interruptions is directly linked to the target load factor. The need for this change arises from the previous lack of adequate supervision in the evening hours when most repairs and maintenance of equipment take place. *Id.*

In addition to the above changes, the MTA has taken steps to hire additional clerical personnel and an assistant transportation manager at each division. Reichert Decl., ¶ 4. By adding this support, transit supervisors will have the time needed to conduct more on-street supervision and training of operators. *Id.* In the past, transit supervisors were performing clerical work in addition to their supervisory duties, and were not spending enough time out in the field to properly supervise and oversee the operation of the system, including operators running ahead of schedule. *Id.* Running "hot" or ahead of schedule, has the effect of increasing the gap between buses and thus increases passenger loads for later buses. *Id.* Accordingly, by increasing the time supervisors spend on the street, the number of drivers running "hot" or ahead of schedule will be reduced and there will be a more even distribution of passengers on each bus. *Id.* Another result from this action is that service interruptions will be reduced to the extent that the transit supervisor is available to reach the location of the service interruption and assist in replacing service. Additional

training will improve the assignment of bus drivers and reduce service interruptions caused by driver unavailability. *Id.*

The changes and actions taken thus far are standard procedures that are utilized in the industry and will result in improved systems operations. Reichert Decl., ¶ 5, Hirsch Decl., ¶ 13. They will have the cumulative effect of improving service delivery and hence will reduce even further the target load factor within the next few months.

IV. THE MTA MAY DETERMINE THE LOAD FACTOR WITHOUT DATA ON "BY-PASSED" PASSENGERS.

A. The Consent Decree Permits The MTA To Use its Own Procedures To Determine The Load Factor.

The Consent Decree provides that the "MTA shall conduct ride checks to determine load factors *using current MTA procedures and schedules.*" The MTA's procedures and schedules which have been in effect for at least 10 years, do not include gathering data on "by-passed" passengers. Woodbury Decl., ¶ 14. Thus, the fact that the MTA does not gather data on "by-passed" passengers 2 is not a violation of the Consent Decree.

B. There Is No Allegation Or Demonstration That The MTA Is Bypassing Passengers.

The Consent Decree states that MTA may not intentionally "by-pass" passengers at bus stops in an effort to meet the target load factor. Simply using data that does not account for by-passed passengers is not synonymous with intentionally by-passing passengers and is not a violation of the Consent Decree.

C. There Is No Proper Method To Collect Data On By-Passed Passengers.

Plaintiffs' contention that the MTA violates the Consent Decree by calculating the load factor without data on by-passed passengers ignores the fact that there are serious problems associated with gathering data on by-passed passengers. Woodbury Decl., ¶ 14; Hirsch Decl., ¶ 14. One of the primary problems occurs because a passenger is counted when that passenger is by-passed, and counted once again when the passenger boards a bus. *Id.* This leads to double counting of passengers. *Id.*

Another problem is determining who is a "by-passed" passenger. *Id.* Unless individual interviews are conducted at each bus stop, it is impossible to determine who is waiting for which bus at bus stops served by multiple bus lines. *Id.* It is also impossible to determine who among the people standing in the vicinity of a bus stop is waiting for the bus in order to ride it, as opposed to those who are there to meet someone arriving by bus. *Id.* Similarly, it is difficult to determine whether a passenger is "by-passed" if two buses arrive within a few moments of each other, *i.e.*, both buses being within the sight of the observer at the same time, and the first bus does not stop, but the second bus does. *Id.* There is no method to properly account for this occurrence. *Id.* Finally, there is no procedure to determine whether a passenger should be considered "by-passed" in the event a dispatcher or road supervisor orders a bus to skip several stops to even the spacing between buses, or close a gap created by a missing trip. *Id.*

In essence, because there is no unambiguous means of determining who is a pass-by, nor with which bus they should be associated, to impose such a requirement on the MTA is not

only outside the scope of the Consent Decree, but inappropriate in light of the inaccuracies inherent in such data.

D. The Common Practice In The Industry Does Not Include Accumulating Data On By-passed Passengers in Determining the Load Factor

The standard in the industry is consistent with the MTA's practice. In a survey of twelve of the largest bus operators in the country, it was found that, like the MTA, seven do not account for by-passed passengers to determine the load factor, three do not account for by-passed passengers in any manner, and two did not respond. *See,* Woodbury Decl., ¶ 15. Based on these findings, it would be unreasonable to impose a duty on the MTA to account for by-passed passengers when that is clearly not the common practice for major bus operators in the U.S. *Id.*; Hirsch Decl., ¶ 14.

V. THE MTA MAY DETERMINE THE LOAD FACTOR BY ANALYZING/CATEGORIZING MONITORING DATA INTO FIXED MINUTE INTERVALS

A. The Consent Decree permits The MTA To Use Its Own Procedures To Determine The Load Factor.

The Consent Decree provides that the "MTA shall conduct ride checks to determine load factors using *current MTA procedures and schedules.*" The MTA's procedures and schedules in existence at the time of the negotiation of the Consent Decree--and for at least 10 years prior to the Consent Decree--used fixed 20 minute time intervals. Woodbury Decl., ¶ 16. MTA's procedures include two mechanisms for reporting/analyzing ride check or point check loading data. The

first is a periodic report (the Service Capacity/Utilization Report) prepared by the Operations Planning Department, following service changes; the second is an analytic tool ("Headway Sheets") used by the schedule makers whenever a check is conducted. *Id.* Each of these tools utilizes fixed 20-minute time periods (hourly time periods at off-peak times). *Id.*

While negotiating the Consent Decree, the plaintiffs had the opportunity to negotiate a change or alteration of the procedures and schedules used by the MTA to determine the load factor. They never even raised the issue.

Finally, the correct interpretation of the use of the word *any* in the referenced portion of the Consent Decree is with regard to any of the time periods monitored, not any 20-minute interval which is governed, pursuant to the words of the Consent Decree, by prior MTA practice.

B. The Common Practice In The Industry Uses Fixed Time Intervals In Determining the Load Factor, Not Sliding Intervals.

The standard in the industry is consistent with the MTA's procedures. In a survey of twelve of the largest bus operators in the country, it was found that, like the MTA, nine operators use fixed time intervals and only three use a floating or sliding window to determine the load factor. Woodbury Decl. ¶ 16. Based on these findings, it would be unreasonable to impose a duty on the MTA to analyze its data by using sliding time intervals versus fixed time intervals for load factor analysis when that is clearly not the common practice among operators in this country. *Id*; Hirsch Decl. ¶ 15.

VI. CONCLUSION.

For the reasons set forth above, the MTA requests that the approach presented be adopted to determine whether it has complied with the Consent Decree.

Dated: July 8, 1998

Respectfully submitted,

/s/ Kenneth Klein

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July 9, 1998 MTA Brief re Load Factor Compliance

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 300 South Grand Avenue, Los Angeles, California 90071-3109.

On July 8, 1998, I served the foregoing document(s) described as **The MTA's Brief re Load Factor Compliance Standard, Declarations of Dana Woodbury, Harold Hirsch, Habib Balian, James Reichert and Richard Hunt** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelopes to be delivered as stated above.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

July 9, 1998 MTA Brief re Load Factor Compliance

Executed on July 8, 1998, at Los Angeles, California.

_____

Jill D. Howell